2007

Trugreen Companies, L.L.C., a Delaware limited liability company v. Mower Brothers, Inc. a Utah corporation : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

TRUGREEN COMPANIES, L.L.C., a Delaware limited liability company, and TruGreen Limited Partnership, a Delaware limited partnership, Petitioners, vs. MOWER BROTHERS, INC., a Utah corporation, KEVIN D. BITTON d/b/a SCOTTS LAWN SERVICE, a Utah entity, GREENSIDE, L.L.C., a Utah limited liability company, KEVIN D. BITTON, an individual, JEAN ROBERT BABILIS, an individual, RYAN MANTZ, an individual, JASON HILLER, an individual, LARY GAYTHWAITE, an individual, MATT WALKER, an individual, JIM LEBLANC, an individual, JAMES CLOGSTON, an individual, RICK DEERFIELD, an individual, DAVID STEPHENSEN, an individual, DAVID VAN ACKER, an individual, ISAIAH PLUMLEY, an individual, SHANNON CHRISTENSEN, an individual, PAUL BROWER, an individual, JAMES MURRAY, an individual, RICHARD COFFMAN, an individual, TAMMY ROEHR, an individual, JESSICA SPENCER, an individual, MARGIE SMITH, an individual, ALFREDA EGBERT, an individual, JASON BECK, an individual, Respondents.	Case No. 20070451-SC

OPENING BRIEF OF PETITIONERS

On Certification of Question of State Law by the United States District Court,
in and for the District of Utah, Honorable Paul G. Cassell
1:06-cv-24 PGC

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ORAL ARGUMENT REQUESTED

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to the proceeding in the United States District Court.

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STATEMENT OF JURISDICTION

Pursuant to Utah Rule of Appellate Procedure 41, this matter is before the Utah Supreme Court upon a Certification of Question of State Law by the United States District Court for the District of Utah.

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

The Utah Supreme Court has accepted the following questions for review:

Question 1. Whether under Utah law a former employer is entitled to an award of lost profits damages, or instead an award of restitution or unjust enrichment damages, where a former employee has breached contractual non-competition, non-disclosure, and employee non-solicitation provisions?

Question 2. Whether Utah law recognizes an unjust enrichment measure of damages for tortious interference with a competitor's contractual and economic relations?

Standard of Review: When a federal court certifies questions of state law, the Court "answer[s] the legal question presented without resolving the underlying dispute." *In re Kunz*, 99 P.3d 793, 794 (Utah 2004) (quoting *Spackman ex rel. Spackman v. Bd. of Educ.*, 16 P.3d 533, 534 n. 2 (Utah 2000)). The Court accepts as true the facts described by the federal court. *Id.* at 793-94.

DETERMINATIVE RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

No interpretation of constitutional provisions, statutes, ordinances, rules or regulations are determinative of the questions of law certified for review.

STATEMENT OF THE CASE

Once upon a time, this case was "about honoring contracts [and] the financial consequences of knowing and volitional breaches . . ." *Order Denying Motion For Preliminary Injunction*, July 25, 2006, (United States District Court for the District of Utah ("District Court"), Docket No. ("D.") 112) at 1. Subsequently, and as a predicate to this certification, it has become one in which Petitioners (collectively "TruGreen") have explicitly "proven the fact of damages," but nonetheless been denied relief because of questions concerning their amount. *Order Addressing Certification*, March 6, 2007 (D. 275),[1] at 2.

On July 25, 2006, following extensive fact discovery and briefing by the parties, the District Court entered an order denying TruGreen injunctive relief for numerous breaches of contract involving several former employees and their new employer/TruGreen competitor, Respondent Mower Brothers, Inc. dba Scotts LawnService (hereinafter "Mower Bros." or "Scotts"). *Order Denying Motion For Preliminary Injunction* (D. 112). Beginning in November 2005 and continuing through approximately January 2006, these veteran employees departed en mass from TruGreen's Utah and Idaho branches at the behest of Mower Bros. and its principals, Respondents Kevin D. Bitton and Jean Robert Babilis, and began committing serious violations of their respective "Employee Confidentiality/Non-Compete Agreements" ("Non-Compete Agreements"). *Id.* at 2. As alleged by TruGreen, these violations included employment with Mower Bros./Scotts in the same geographic areas and capacities in which they were previously employed with TruGreen, disclosure of confidential information, and the recruitment of other TruGreen employees. *Id.* While evidence presented by TruGreen for preliminary injunction "unmistakably show[ed] a likelihood of success on the merits" and caused the District Court to remark that Respondents' actions "undoubtedly caused serious harm

[1] Submitted herewith in addendum.

to TruGreen," in the end, injunctive relief was denied on the District Court's determination that money damages could compensate TruGreen for its breach-of-contract and tortious interference claims. *Id.* at 1, 5-7.

Fast forward to February 13, 2007. Following the District Court's request for a "quick resolution" by summary judgment and further briefing by the parties, *Id.* at 10-11, the District Court entered an order denying TruGreen summary judgment and granting judgment in favor of Respondents on several cross-motions, including the exclusion of TruGreen's expert damage witness. *Order Granting In Part and Denying In Part Defendants' Motion For Summary Judgment, Granting Defendants' Motion to Strike Expert Report, and Denying Plaintiffs' Motion For Summary Judgment* (hereinafter "Feb. 13 Summary Judgment Order") (D. 253). Pursuant to this order, several TruGreen customer representatives, subsequently employed with Mower Bros. and later added as parties to the action, were removed from the case[2]; TruGreen's tortious interference claims against the employee-Respondents were denied; and more recent versions of the Non-Compete Agreements were found controlling—despite a prior ruling to the contrary[3]—to eliminate individual breach-of-contract claims. *Id.* at 1-3. Even so, what remained were the following contract and tort claims against the respective Utah and Idaho Respondents, substantively intact from the request for preliminary injunction:

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[2] Following amendment to add these additional administrative and technical employees as parties, TruGreen specifically did not pursue summary judgment damages but focused instead on those employee-Respondents who were the subject of TruGreen's initial request for preliminary injunction and remain the subject this current certification. *Memorandum in Support of Plaintiffs' Motion for Summary Judgment* (D. 178) at vi n. 5.

[3] In its July 25, 2006 *Order Denying Motion For Preliminary Injunction* (D. 112), the District Court originally ruled that these agreements "appear to supplement rather than replace" the specific provisions subsequently cut off in the February 13, 2007 Summary Judgment Order. *Compare Order Denying Motion For Preliminary Injunction* (D. 112) at 8; *Feb. 13 Summary Judgment Order* (D. 253) at 32 (finding "that the new agreements are the controlling documents").

- Breach of non-competition provisions as to Respondents Gaythwaite, LeBlanc, Hiller, Clogston, Deerfield, Van Acker and Roehr;
- Breach of non-disclosure provisions as to Respondents Mantz, Gaythwaite, LeBlanc, Stephensen, Hiller, Clogston, Deerfield, Van Acker and Roehr;
- Breach of employee non-interference provision as to Respondents Mantz, Gaythwaite and Hiller; and
- Tortious interference with economic and contractual relations as to Respondents Mower Bros., Scotts, Bitton, Babilis, Mantz, Hiller and Gaythwaite.
- Unfair competition as to Mower Bros., Scotts, Bitton and Babilis.

Id. at 34.

However, TruGreen's expert witness and report were ordered excluded from trial on the basis of Fed. R. Evid. 702 and what the District Court described as the expert's inability to explain how "profits earned by Scotts were in fact stolen away from TruGreen." *Id.* at 37. Specifically, that TruGreen's calculation of damages, based on marked gains in Scotts' revenues,[4] were not adequately buttressed to survive potentially confounding intervening causes of gains and losses raised by Respondents. *Id.* at 39. Consequently, the District Court questioned whether the entire case should be dismissed and ordered further briefing from the parties. *Id.* at 43. Additionally, the District Court denied TruGreen's claim for punitive damages. *Id.*

As a result of this order, on February 28, 2007, the District Court convened a hearing on the impact of the damage expert's exclusion. It was at this hearing that the District Court acknowledged it did not completely understand TruGreen's damage theory of restitution, *Motion*

[4] *TruGreen Calculation of Claims* (D. 169) at 6 (basing calculation of Scotts' revenue gains on terms within the employee-Respondents' respective Non-Compete Agreements and the assumption "that courts have considered the gain achieved by defendants as a result of defendants' actions as an appropriate basis to determine the amount" of TruGreen's damages).

Hearing Transcript, February 28, 2007, (D. 271)[5] at 15:16-18, 41:16-45:8, 56:17-57:6, but rather "thought [it] was ruling on sort of a lost profit damage calculation." *Id.* at 50:20-51:6. In response to TruGreen's recitation of the summary judgment record and several exhibits prepared by Respondents' own witnesses, the District Court tentatively ruled that while Idaho law recognized only a "lost profits" measure of damages for TruGreen's claims, Utah remained an open question. *Id.* at 61:8-63:18.[6] Accordingly, the District Court concluded that it would certify the question of restitution or unjust enrichment damages to this Court, against the explicit backdrop "**that TruGreen has proven the fact of damages but that questions remain as to the amount of damages**." *Order Addressing Certification* (D. 275) at 2 (emphasis added).

On June 8, 2006, the District Court granted Respondents' summary judgment motion with respect to the Idaho employees on the sole basis of lost profits damages (which TruGreen did not principally argue in summary judgment) and certified the above questions to this Court. *Order Granting In Party and Denying In Part Defendants' Motion For Summary Judgment*, June 8, 2006 ("June 8 Summary Judgment Order") (D. 286); *Order Certifying Questions of Law to the Utah Supreme Court*, June 8, 2007 ("Order Certifying Questions") (D. 287).[7]

As this action is thus currently poised, final ruling on the above-certified questions will have the actual effect of determining TruGreen's relief; the limited jurisdiction of this Court under Utah R. App. P. 41, notwithstanding. As summarized and argued below, a decision to sanction or disallow the recovery of Respondents' unjust gains will either permit justified claims of breach of contract and tortious interference to proceed, or alternatively preclude TruGreen outright from *any* relief. Against this factual and procedural backdrop and the District Court's

[5] Docket No. 271 references a minute entry of this hearing. A full transcript of the hearing was requested as part of the record transferred from the District Court.

[6] The District Court remarked, however, "If it were up to me, if I were the one that got to write the law, I would say the Massachusetts court [cited by TruGreen] has got it right. That restitution ought to be a reasonable measure of damages."

[7] Submitted herewith in addendum.

notion that restitution is justified in this instance, *see n. 4, supra*, TruGreen respectfully requests that this Court answer certification that Utah law recognizes an award of restitution or unjust enrichment damages for the breach of non-competition covenants and a competitor's tortious interference with contractual and economic relations.

STATEMENT OF RELEVANT FACTS

Conscious of this Court's acceptance of facts as described by the District Court, *supra*, but nonetheless faced with the practicality of arguing the merits of restitution on relatively few written findings of liability[8] (especially with the respect to Respondents' tortious conduct), TruGreen summarizes the following relevant facts as argued in the parties' summary judgment memoranda. Where appropriate, TruGreen has attempted to distinguish facts concluded by the District Court in its rulings from those disputed by Respondents:

1. TruGreen is a lawn care company with offices throughout the United States. It is the nation's largest provider of residential lawn care and undertakes substantial marketing and sales efforts to establish and maintain its customer base. *Feb. 13 Summary Judgment Order* (D. 253) at 4.

2. Employing many full-time individuals, TruGreen utilizes sales representatives who are responsible for selling TruGreen programs and services, compiling lists of prospective customers, engaging in person-to-person contacts by telephone and neighborhood marketing efforts, and following up with customer inquiry leads. *Id.*

3. Branch marketing managers at TruGreen plan, direct, and coordinate marketing and sales efforts and branch managers have general oversight and control of a branch office, including marketing and sales. *Id.*

[8] *See Feb. 13 Summary Judgment Order* (D. 253) at 4 ("Rather than recite the entire backdrop of this case, the court briefly recites the facts relevant to this order.").

4. TruGreen further alleges, and Respondents dispute, that depending on their position and degree of responsibility each employee receives an extensive and consistent regiment of specialized training, exposure to marketing and financial information, and other business practices which TruGreen considers confidential. *Id.*; *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) at viii-xiv, ¶¶ 5-33; xxii, ¶¶ 55-57.

5. Accordingly, TruGreen requires its employees to sign confidentiality and non-competition contracts as a condition of their employment. *Feb. 13 Summary Judgment Order* at 5 (D. 253); Exhibits A1-9 to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178).

6. Respondent Mower Bros. is a registered Utah corporation and franchisee of the Scotts service mark that operates branches in Utah, Idaho and Oregon. Scotts is a direct competitor of TruGreen and offers lawn care services that are substantially similar to that of TruGreen. *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) at xiv-xv, ¶¶ 34 and 36; *Memorandum Opposing TruGreen's Motion For Summary Judgment* (D. 201) (offering no objection to the above-referenced facts and paragraphs).

7. Under the original direction and ownership of Respondent Bitton, Mower Bros. first acquired its Scotts franchises in 2002 and 2004. Since late 2004, Respondent Babilis has directed Mower Bros.' affairs and been intimately involved in the day-to-day operations and development of the company. However, prior to Mower Bros.' acquisition of the Scotts franchises, neither Bitton nor Babilis had any experience whatsoever in the ownership and operation of a lawn care service business. In fact, the Mower Bros./Scotts franchise entity, as it currently operates, has only been functioning since 2005. *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) at xv-xvi, ¶¶ 36, 38-42; *Memorandum Opposing*

TruGreen's Motion For Summary Judgment (D. 201) (offering no objection to the above-referenced facts and paragraphs).

8. Like TruGreen, Respondent Mower Bros./Scotts has adopted and requires its own employees, including each of the respective employee-Respondents, to sign the same non-competition contracts and restrictive covenants as TruGreen. *Order Denying Motion For Preliminary Injunction* (D. 112) at 10; Exhibits B1-9 to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178).

9. The genesis of this dispute stems from the departure of Respondent Ryan Mantz, a former branch manager of TruGreen's Ogden branch, who voluntarily resigned from TruGreen on or about November 1, 2005, and within weeks began working for Scotts in Ogden, Utah. *Feb. 13 Summary Judgment Order* (D. 253) at 5.

10. TruGreen alleges, and Respondents dispute, that Mantz immediately began recruiting other TruGreen employees in Utah and Idaho to join him at Scotts with the aid and encouragement of Mower Bros. and its principals, Bitton and Babilis. *Id.*; *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) at xvi-xxii, ¶¶ 44-51; *Reply Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 232) at 11-14.

11. TruGreen alleges that this encouragement and aid specifically included a written offer by Mower Bros. to Mantz,

> [T]o provide all legal protection and pay all attorney fees and costs should [Mantz's] previous employer (Chemlawn / Tru-Green) elect to pursue any employment contract issues.

Exhibit B1 to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178).

12. TruGreen alleges, and Respondents dispute, that under Babilis' leadership, Mower Bros. pursued Mantz and other veteran TruGreen employees in spite of their knowledge of the Non-Compete Agreements, with the intent to acquire and exploit TruGreen's marketing

and training expertise previously lacking in the newer and less-experienced Mower Bros./Scotts franchises. TruGreen further alleges that Babilis desired to cripple TruGreen by taking out its upper management and other key sales employees, thus boosting Mower Bros.' short-term sales and customer accounts with hopes of ultimately selling back one or more of its franchises to the Scotts corporate entity at an inflated value. *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) at xvi-xxii, ¶¶ 44-57.

13. Since early 2006 through at least year-end, three of Mower Bros.' four branch marketing managers, including the Ogden, Salt Lake City, and Boise franchises, are former TruGreen branch marketing managers. *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) at xxi, ¶ 52; *Memorandum Opposing TruGreen's Motion For Summary Judgment* (D. 201) (offering no objection to the above-referenced facts and paragraph).

14. Respondent Mantz is also a branch manager of Mower Bros.' Salt Lake City franchise and recognized as the Scotts' regional marketing manager. *Feb. 13 Summary Judgment Order* (D. 253) at 9.

15. Additionally, the top five producers among all Mower Bros.' sales representatives for the year 2006 are all former TruGreen sales representatives. *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) at xxii, ¶ 54; *Memorandum Opposing TruGreen's Motion For Summary Judgment* (D. 201) (offering no objection to the above-referenced fact).

16. Mantz started working for TruGreen in 1993 and was employed in various positions and in various geographic areas for over twelve years. While employed at TruGreen, Mantz entered into at least two Non-Compete Agreements. The first agreement, signed on April 19, 1993, included a six-month post-termination non-compete provision. *Feb. 13 Summary*

Judgment Order (D. 253) at 9-10. The later, signed in 2003, prohibited Mantz only from competing with TruGreen during his employment and included additional non-solicitation, employee non-interference, and non-disclosure provisions. *Id.* at 9-10; Exhibit A1 to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178).

17. Respondent Lary Gaythwaite was hired by TruGreen in 1998 as a sales representative in TruGreen's Boise branch. Thereafter, between December 1999 and November 2005, Gaythwaite held a number of job titles with TruGreen, including branch manager and branch marketing manager, and worked in both Utah and Idaho. In November 2005, Gaythwaite left TruGreen and accepted a position with Scotts as its Salt Lake City branch marketing manager. *Feb. 13 Summary Judgment Order* (D. 253) at 11.

18. Respondents Dave Stephensen and Jim LeBlanc were hired by TruGreen in 1994 and 2001, respectively. Both were hired as sales representatives, with Stephensen starting his work in TruGreen's Ogden office and LeBlanc working in the Boise and later Ogden branches. Both Stephensen and LeBlanc left TruGreen in January 2006, and soon thereafter started working for Scotts in its Ogden and Salt Lake City franchises, respectively. *Id.* at 11.

19. During their employment with TruGreen, Gaythwaite, LeBlanc, and Stephensen each signed at least two Non-Compete Agreements in favor of TruGreen. These agreements contain non-solicitation, non-interference and non-disclosure provisions that were very similar to the ones contained in the agreements signed by Mantz. Additionally, the non-competition provision in Gaythwaite's most recent agreement, signed in 2004, stated that Gaythwaite could not compete with TruGreen for one year following his employment in any geographic area in which he was assigned duties during the last six months of employment. Also, the non-competition provision contained in the agreement signed by LeBlanc in 2002 stated that LeBlanc could not compete with TruGreen for six months following his employment with TruGreen in

any geographic area in which he was assigned duties during the last six months that he was employed by TruGreen. *Id.* at 11-12; Exhibits A3-5 to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178).

20. LeBlanc spent at least the last six months of his employment with TruGreen working at its Ogden branch in Clearfield, Utah. After leaving TruGreen, LeBlanc began working for Scotts in its Salt Lake City branch. Gaythwaite also spent the last six months of his employment in TruGreen's Ogden office, and after leaving, worked for Scotts in its Salt Lake branch office in Murray, Utah. There is some testimony, however, that Gaythwaite prepared budgets in Salt Lake City during his last six months of employment with TruGreen and that LeBlanc made collection calls out of Salt Lake City during his last six months of employment. *Feb. 13 Summary Judgment Order* (D. 253) at 12.

21. While Stephensen also signed two Non-Compete Agreements in favor of TruGreen containing the same restrictive covenants, the later contract stated that Stephensen's non-competition covenant was only valid while he was employed with TruGreen. *Id.* at 12.

22. Respondents Jason Hiller, James Clogston, Rick Deerfield, and David Van Acker were each employed by TruGreen in its Boise branch as branch marketing manager and sales representatives, respectively. Each signed similar Non-Compete Agreements with non-disclosure, non-solicitation and non-interference provisions, as well as a one-year post-termination non-compete covenant. Upon their departure from TruGreen in November 2005 through January 2006, each of these employees began working for Scotts in the same geographic area where they previously worked for TruGreen, namely, Boise. *Id.* at 13-15; Exhibits A2, 6-8 to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178).

23. Additionally, as part of Hiller, Clogston, Deerfield, and Van Acker's employment with Mower Bros./Scotts, each was offered in writing a defense for all "claims made against

[them] by [their] previous employer" and/or assured that "[a]ny legal fees [would be] taken care of in the event that action [was] taken against a violation of a non-compete agreement with [their] former company," TruGreen. Exhibits B2, 6-8 to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178).

24. TruGreen alleges, and Respondents dispute, that following the mass departure of its employees, it suffered a significant loss of critical management and sales personnel, which required the transfer of veteran sales representatives from other branches and the hiring and training of several new and inexperienced employees. *Reply Memorandum in Support of Plaintiffs' Motion For Preliminary Injunction* (D. 77) at lvii-lviii, ¶¶ 127-29; Exhibit A to *Plaintiffs' Memorandum on Damages* (D. 260).

25. Conversely, Respondent Mower Bros. experienced significant gains succinctly articulated in a March 6, 2006 email memorandum issued by Mantz to Mower Bros.' ownership, including Bitton and Babilis:

> **Sales Growth has occurred despite the dramatic drop in Mail Response.**
> - **As a region we have increased sales revenue 46% over last year.**
> - Last year we had sold $617,000
> - This year we have sold $899,950
> - While Inquiries dropped 53% -- sales rose 46% -- This is a 99% swing in improvement!
>   - Our sales team has improved immensely over last year. We could be going backwards as a business or simply staying flat with 3,700 less Inquiries.
>   - Take time to pat our Sales Managers on the back. They are really saving our bacon by teaching these guys how to maximize every lead.
>
> * * *
>
> IN SUMMARY:
> While we should be very concerned about our current mail numbers, we are dominating last year's results. If we sold this year's [2006] low Inquiries at last year's [2005] efficiencies, we would have sold only $288,000. Instead of dwelling on crappy response rates, we are getting it done as a team.

> I want to make sure everyone is aware of the success we are having and warn us against just talking about our dire response rates compared to last year. Thank our reps and sales managers for not turning in a $228,000 and getting us near to the near $900,000 mark through February!

Exhibit J to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178); *Memorandum Opposing TruGreen's Motion For Summary Judgment* (D. 201) (offering no objection to the above-referenced email and content).

26. As of that same day, March 6, 2006, the top five sales representatives producing these results were all former TruGreen employees. Exhibit J to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178); *Memorandum Opposing TruGreen's Motion For Summary Judgment* (D. 201) (offering no objection to the above-referenced email and content).

27. A later report submitted by Respondents' designated expert on January 30, 2007, exhibits the 2006 gains of Mower Bros. by branch and sales representative as follows[9]:

Ogden	
TOTAL REVENUE	$1,452,244.93
Dave Stephensen	$280,744.49
Salt Lake City	
TOTAL REVENUE	$1,398,045.50
Jim LeBlanc	$374,705.89
Boise	
TOTAL REVENUE	$777,884.67
James Clogston	$194,999.94
David Van Acker	$184,079.34
Rick Deerfield	$120,764.41

Exhibits 20, 20.1-4 to *Expert Report of Derk G. Rasmussen* (D. 240); Exhibit B to *Plaintiffs' Memorandum on Damages* (D. 260).

[9] A breakdown remarkably similar to that offered in the excluded damage report from TruGreen. Exhibit 8 to *Calculation of Claims* by F. Wayne Elggren, CPA, CFE, CIRA. (D. 169).

28. As stated in paragraphs 13 and 14, *supra*, Respondent Mantz and a former TruGreen marketing manager, including Walker, Gaythwaite, and Hiller, presided over each of these branches and sales representatives, respectively. Moreover, each former TruGreen sales representative (with the exception Deerfield) exceeded in revenue the next highest Mower Bros. sales representative by at least six figures. *Id.*

29. A discussion with the District Court of these and other facts as they relate to the issue of restitution/unjust enrichment damages is included in transcript from the above-referenced February 28, 2007 hearing. *Motion Hearing Transcript*, February 28, 2007, (D. 271) at 17:5-20:25, 37:5-46:6, 80:2-82:9.

SUMMARY OF THE ARGUMENT

With due respect to the District Court's statement of the issues, the order of contract first and tort second is pregnant with the suggestion that tort damages in this case are dependent upon an underlying determination of contract damages. To be sure, all Idaho claims against Respondents, including tort claims, were dismissed on the sole basis of *Dunn v. Ward*, 670 P.2d 59, 61 (Idaho App. 1983), a contract case,[10] and the District Court's interpretation that Idaho permits only a "lost profits" measure of damages. *June 8 Summary Judgment Order* (D. 286) at 6, 9-11. By disposing of all claims in this manner, however, such negates the recognition of separate and independent causes of action against the interfering Respondents whose catalytic actions precipitated the contract breaches and not the other way around. As argued below, just because a measure of damages (in this case restitution or unjust enrichment) may not be available in contract does not mean it is soundly precluded in tort. In other words, answer to Certified Question No. 2 is not dependent on Question No. 1.

[10] Specifically, a case addressing damages for breach of a non-competition covenant ancillary to the sale of business (and not an employment contract as here), and involving absolutely no claim for tortious interference.

Accordingly, TruGreen presents its arguments as follows:

Certified Question No. 2

The Utah Court of Appeal's adoption of the *Restatement (Second) of Torts* § 774A (1979) and its recognition of actual and consequential loss damages for tortious interference with contractual and economic relations does not foreclose restitution or unjust enrichment as a proper measure of damages. Cases from other jurisdictions under similar circumstances have held that notwithstanding the considerations of Section 774A, restitution is available for a competitor's inducement of massive breaches of non-competition agreements and that a plaintiff may recover damages measured by the defendant tortfeasor's gains. Moreover, cases which have declined to permit a restitutionary measure have done so on considerations of limited or no consequence to this case.

Based on the facts and circumstances of this case and due to the nature of Respondents' tortious actions, the Court should answer that Utah law would permit recovery in favor of TruGreen under an unjust enrichment or restitutionary measure of damages. Specifically, because (1) the interests harmed by Respondents are comparable to other business torts which permit restitution, (2) the actual losses incurred by TruGreen are not readily ascertainable,[11] (3) an award of Respondents' ill-gotten gains would not create a prima facie windfall in favor of TruGreen, (4) TruGreen's claims against the interfering Respondents sound in tort, not contract, and (5) Respondents should not be allowed to speculate that gains will exceed TruGreen's losses.

[11] *Order Addressing Certification* (D. 275) at 2 ("As a backdrop for the certification issue, the court believes that TruGreen has proven the fact of damages but that questions remain as to the amount of damages.").

Certified Question No. 1

The *Restatement (Second) of Contracts* is silent with respect to the use of a restitutionary (also referred to as "disgorgement" or "unjust enrichment") measure of damages as referenced in this case. This oversight is likely the consequence of the rare circumstances in which the theory is implicated. Courts have recognized that "classic" compensatory contract damages often fail to address the harm caused by a breach of a contract designed to protect legitimate business interests such as non-compete, non-disclosure and non-solicitation agreements. In these cases, the windfall obtained by the breaching party should be available for the non-breaching party's recovery. If not, as in this case, the breaching party gains from its breach. In recognition of this principle, Courts sometimes shape a theory of recovery that addresses the ill-gotten gains of the breaching defendant by using the breaching defendant's profits as a proxy or surrogate to measure damages. This is particularly true where, as in this case, parties attempt to provide for recognition of these damages through liquidated damages clauses that would provide the same restitutionary measure. This Court should consequently recognize the restitutionary measure of damages under contract law for the breaches of the non-competition, non-solicitation and non-disclosure agreements in this case.

ARGUMENT

I. The Court should answer in the affirmative to Certified Question No. 2 that Utah law recognizes an unjust enrichment measure of damages for tortious interference with a competitor's contractual and economic relations.

The rough adherence displayed by Respondents to generally ensconced tort principles and Utah's adoption of the *Restatement (Second) of Torts* § 774A[12] does not easily sidestep the

[12] Section 774A provides that "[o]ne who is liable to another for interference with a contract or prospective contractual relation is liable for damages for (a) the pecuniary loss of the benefits of the contract or the prospective relation; (b) the consequential losses for which the interference is a legal cause; and (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference."

question of unjust enrichment or restitution as an available measure of damages for tortious inference with contractual and economic relations. *Order Certifying Questions* (D. 287) at 6-7 (summarizing Respondents' argument that *Sampson v. Richins*, 770 P.2d 998, 1006-07 (Utah App. 1989) "is fully instructive" on the issue of tort damages). While Utah has never addressed the issue, precedents from other jurisdictions indicate that courts are reluctant to accept the absence of restitution in Section 774A as an outright preclusion of this remedy in all instances of tort damages as Respondents contend. In fact, courts have expressly permitted the same under particular circumstances, including a defendant employer's tortious interference with a competitor's non-competition covenants. Prosser & Keeton, *Law of Torts* § 129, 1004 (5th ed. West 1984) ("There is authority permitting the plaintiff to recover the profits defendant made from inducing a breach of contract"); Palmer, *The Law of Restitution* § 2.6, 80-81 (1978).

What is clear from these cases—many of which have been inadequately explained by Respondents—is that the analysis of unjust enrichment as an appropriate tort remedy in this case cannot consist of simply looking to the *Restatement (Second) of Torts* § 774A or to factually-confined appellate reviews of a plaintiff's lost profits calculation.[13] Indeed, the cases reveal that Section 774A is not dispositive of Certified Question No. 2 and courts do not broadly brush aside unjust enrichment as an acceptable measure of damages for tortious interference. A measured examination is required of the particular facts and circumstances of the given case, the special interests harmed by the tortfeasor's interference, whether the potential lost profits or expectancies of the plaintiff are readily ascertainable and thus alternatively viable, whether the court is confronted with the peculiar problem of a prima facie windfall in favor of one party, and whether

[13] *Defendants' Proposed Order Certifying Questions of Law to the Utah Supreme Court* ("Proposed Order Certifying Questions") (D. 277) at 8-9 n. 9 and 10 (citing without analysis numerous authorities as "recogniz[ing the proposition] that plaintiff's lost profits, and not restitution of defendant's revenues, are the proper measure of damages for tortious interference").

the court will equate tort with contract and limit the plaintiff's remedy to underlying contractual damages.

As discussed below, the facts and circumstances of this case suggest that unjust enrichment is an appropriate measure of damages for Respondents' tortious interference with TruGreen's contractual and economic relations. Given the inherent difficulty in quantifying damages from mass breaches of non-competition contracts (for which TruGreen preliminarily sought injunctive relief), that Respondents' gains are expressly attributed to the solicitation and hiring of TruGreen employees, that issues of disclosed confidential information, employee solicitation and unfair competition remain, and that TruGreen's damages against the interfering Respondents clearly sound in tort, answer to the District Court as to Certified Question No. 2 should be in the affirmative.

A. There is authority for permitting TruGreen to recover profits gained by Respondents for inducing mass breaches of the Non-Compete Agreements.

As correctly indicated by the District Court, there is no controlling Utah authority addressing the issue of whether unjust enrichment can be a proper measure of damages for tortious interference with a competitor's contractual and economic relations. *Order Certifying Questions* (D. 287) at 2. In fact, as evidenced by Respondents' citations, the only cases addressing the issue of damages for tortious interference involve circumstances materially different from those here and specifically do not concern the competing interests of an interfering tortfeasor such as Respondents.[14] Moreover, because of the nature of these cases, the gains of the interfering defendants were not even in issue.

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[14] *Defendants' Proposed Order Certifying Questions* (D. 277) at 9 n. 10; *Sampson*, 770 P.2d at 1000-02, 1007 (attorney's tortious interference with partnership entities to the detriment of client partners); *Anderson Dev. Co., L.C. v. Tobias*, 116 P.3d 323, 328-30, 334 (Utah 2005) (city residents' interference with developer's third-party contract for purchase of real estate); *Penelko, Inc. v. John Price Assoc., Inc.*, 642 P.2d 1229, 1232-34 (Utah 1982) (assignee's interference with parking and signage to harm of lessee theater business); *Globe Leasing Corp. v. Bank of Salt Lake*, 586 P.2d 420 (Utah 1978) (bank's interference with leasing corporation's business).

Accordingly, there is nothing to suggest a recognition of lost profits as the exclusive measure of damages. *See Motion Hearing Transcript* (D. 271) at 63:6-7 ("And *Sampson* [*supra*], while talking about loss to the plaintiff, doesn't seem to foreclose this other theory [of restitution]."). To the contrary, as the following authorities indicate, notwithstanding a state's basic adherence to *Restatement (Second) of Torts* § 774A and other general tort rules, restitution of a defendant's gains is not always rejected as an appropriate remedy for tortious interference with contractual and economic relations. What is more, in states which have denied unjust enrichment, the courts' holdings are based on conditions of limited or no consequence here; specifically restricting the plaintiff's tort damages to damages resulting from the underlying contractual breach and precluding an undisputedly punitive remedy or windfall to the incapable plaintiff.

1. Cases from other jurisdictions have permitted recovery of damages based on profits or revenues realized by the interfering tortfeasor in spite of recognition of general tort remedies and the adoption of *Restatement (Second) of Torts* § 774A

In the influential case of *Natl. Merchandising Corp. v. Leydon*, the Supreme Judicial Court of Massachusetts was squarely confronted with the issue of unjust enrichment and massive breaches of employee non-compete agreements at the behest of a competing employer. 348 N.E.2d 771 (Mass. 1976). In that case, the plaintiff's business consisted of sending salespersons into various geographic localities to sell advertising space printed on plastic covers for telephone directories. *Id.* at 772. In one year, a number of employees broke away from the plaintiff's business and thereafter commenced to work for a newly organized competing company in violation of their respective non-compete agreements. *Id.* The plaintiff commenced suit against these employees and the competing business for individual breaches of the agreements and

tortious interference, which resulted in the entry of a consent decree in favor of the plaintiff.[15] *Id.* At or about this same time, another executive also departed from the plaintiff's employ and organized a competing business. *Id.* Following entry of the above consent decree, the executive solicited the management services of one of the enjoined employees and recruited several others to sell advertising for his business in violation of their terms of non-competition. *Id.* at 773. Actions for civil contempt and tortious interference were thereafter initiated against at least one of the breaching salesmen, the former executive, and his new business. *Id.* at 772. Specifically, the plaintiff charged that the former executive and his business improperly interfered with the consent decree, "viewed as an agreement" between the parties, and sought injunctive relief and damages. *Id.*

At trial, judgment was entered against the defendants and the lower court awarded damages in amounts representing commissions gained by the breaching salesman as well as gross profits generated by the competing business under the enjoined employee's managership. *Id.* at 773. Each defendant was further enjoined from engaging in future activities violative of the consent decree. *Id.*

On appeal, the defendants argued that the lower court's measure of damages was erroneous and excessive. The Supreme Judicial Court however upheld the award, not only as a measure approximating the plaintiff's loss in sales (determined as an amount which the plaintiff *presumptively* "was capable [of generating], had the interference not occurred," *id.* at 774-75), but also, alternatively, as an amount representing the defendant corporation's gross profits, which the Court expressly equated with the defendant's "unjust enrichment." *Id.* at 775-76. The Court

[15] Terms of the decree were consistent with the employees' covenants not to compete in that each was enjoined "from soliciting or selling advertisements for telephone directory covers, from planning, supervising or managing such solicitations or sales, and from engaging in the manufacture or distribution of telephone directory covers, either on his or its own behalf or as an agent or employee of any person firm or corporation" in their respective geographic territories. *Id.*

reasoned that "[a]n accounting of profits," or an approximation of the defendant's unjust enrichment, joined with an injunction, was a "well understood feature of actions for 'business torts,'" such as unfair competition and trademark infringement, and compared well with the non-compete interests harmed by the defendants' interference. *Id.* at 775. However, the Court also added,

> While the analogy to unfair competition and cognate torts is convenient, it is not necessary, for there is authority both in the case law and scholarly commentary for the direct proposition that an unjust enrichment measure is appropriate for willful interference with contractual relations. Need and reason combine to support this avenue of recovery because [i] it will often be difficult to satisfy strictly a conventional tort formula, and because [ii] an intending tortfeasor should not be prompted to speculate that his profits might exceed the injured party's losses, thus encouraging commission of the tort. Nor should such a defendant be heard to say that the unjust enrichment remedy is unfairly "punitive" because the plaintiff may recover more than his exact loss, when use of a [conventional] tort measure might allow the defendant to retain some part of his ill gotten gains.

Id. at 775-76 (emphasis added) (citing among other authorities *Fed. Sugar Refining Co. v. U.S. Sugar Equalization Board, Inc.*, 268 F. 575, 582 (S.D.N.Y. 1920) ("The point is not whether a definite something was taken away from plaintiff and added to the treasury of defendant. The point is whether the defendant unjustly enriched itself by doing a wrong to plaintiff in such manner and in such circumstances that in equity and good conscience defendant should not be permitted to retain that by which it has been enriched.")).

The Court further questioned a strict equivalence of conventional tort and contract damages, "particularly in an aggravated case like the [one at issue] where the defendants contrive deceptively to create the opportunity for massive breaches of contract . . . by a number of other persons." *Id.* at 776 n. 16.

Since *Natl. Merchandising*, other courts have followed Massachusetts' lead and adopted unjust enrichment as an appropriate measure of damages in circumstances involving a competing tortfeasor and declined to limit a plaintiff's recovery to "strictly a conventional tort

formula" as promoted by Respondents. This, notwithstanding the defendant's specific reliance on the *Restatement (Second) of Torts* and general tort rules to shield against damages and liability.

In *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, the defendant tortfeasor challenged the district court's approval of "restitutionary damages" by arguing that under the *Restatement* such a remedy was unavailable for tortious interference claims. 885 F.2d 683, 691 n. 12 (10th Cir. 1989). Both plaintiff and defendant were competing gas pipeline companies who entered into a servicing agreement which required the plaintiff to sell, and the defendant to buy, specified quantities of natural gas. *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 661 F. Supp. 1448, 1456 (D. Wyo. 1987), *aff'd in part, re'd in part, Colorado Interstate Gas*, 885 F.2d 683. When the defendant intentionally stopped taking gas from the plaintiff, the plaintiff was forced to relinquish certain contract rights it held to purchase gas from a third-party supplier and could not ship the gas for other customers. *Id.* at 1456-57. The defendant thereafter acquired these same rights and began purchasing gas from the third-party supplier for sale to other customers while the plaintiff remained obligated to maintain a stagnant volume of unpurchased gas for the defendant. *Id.* at 1457, 1469.

At trial, the plaintiff was awarded both consequential and restitutionary damages for the defendant's tortious interference with the plaintiff's third-party contract rights. *Id.* at 1478-79. In particular, the jury awarded the plaintiff restitution for profits received by the defendant for transporting the third-party gas to the defendant's customers. *Id.* In post-trial motions, the district court upheld both awards against the defendant.[16] *Id.* at 1479. The court specifically

[16] The district court however granted a limited remittitur in an amount of profits which the defendant did not receive because of a division in ownership of the defendant's gas pipeline. *Id.* ("Only one-third of the Trailblazer Pipeline Company is owned by NGPL [defendant]. Forcing it to disgorge funds it did not receive would unfairly penalize NGPL. A remittitur of two-thirds of . . . the amount awarded as restitution for profits received by Trailblazer Pipeline Company is appropriate.").

affirmed that "[d]amages for tortious interference are based in contract, not tort" and stated that "[r]estitution has long been an accepted remedy for tortious interference with contract." *Id.* (citing comment d to *Restatement (Second) of Torts* § 774 and, among several other authorities, *Natl. Merchandising*, 348 N.E.2d at 775-76). Pointedly, the district court offered no alternative analysis that restitution of the defendant's profits represented an approximation of any of the potential "lost benefits" claimed by the plaintiff under its contract with the third-party supplier. *Id.* at 1471.

On appeal to the Tenth Circuit, the restitution award was subsequently upheld, in which the Court expressly agreed that "the weight of authority holds that restitutionary damages are available for tortious interference with contract." *Colorado Interstate Gas Co.*, 885 F.2d at 691 n. 12 (citing the same authorities as the district court).

In *Sandare Chem. Co., Inc. v. WAKO Intl., Inc.*, the Texas Court of Appeals also cited *Natl. Merchandising* as authority for its holding that "[a]n unjust enrichment measure of damages is appropriate for willful interference with contractual relations"; at least in situations where the plaintiff's lost profits are not readily ascertainable. 820 S.W.2d 21, 23 (Tex. App. 1991). At issue was the appellant-corporation's interference with the business relationship of the appellees, one of whom had previously contracted with the appellant for production of a medical diagnostic test. *Id.* Because of the appellant's tortious interference, the appellees were unable to pursue their plans to manufacture and market a medical diagnostic test, while the appellant proceeded to do so in competition. *Id.* The appellant-corporation challenged the lower court's award of damages for the appellee's failure "to prove the amount of any profit it lost as a result of the interference." *Id.* Like *Natl. Merchandising*, however, the Court of Appeals upheld the decision notwithstanding the fact that no direct evidence established an amount of lost profits equal to the judgment. *Id.*; *Natl. Merchandising*, 348 N.E.2d at 775 n. 10. Because several

intervening causes potentially compromised such a measure, the Court concluded it was reasonable for the trial court to have impliedly determined that lost profits were not readily ascertainable and thus relied on the appellant's unjust gains. *Id.* at 24.

Significantly, in reaching its decision, the Court of Appeals specifically rebuffed the appellant's reliance on *Restatement (Second) of Torts* § 774A as precluding recovery under an unjust enrichment theory. *Id.* at 24-25. After noting that none of the Texas cases cited by the appellant addressed "damages based on the defendant's profits where plaintiff's damages were not readily ascertainable," the Court concluded that the Restatement's silence on this particular issue did not preclude unjust enrichment against the defendant:

> The *Restatement (Second) of Torts sec. 774A* (1979) is a statement of the measure of damages generally applicable to tortious interference cases. It does not directly address the issue of whether one may recover the profits of the defendant in the event the plaintiff's lost profits are not readily ascertainable. If the absence of discussion concerning whether the defendant's profits may constitute the measure of damages when the plaintiff's lost profits are not readily ascertainable means that the *Restatement* has declined to adopt the rule as we have stated it, then we decline to adopt the *Restatement section 774A* as the measure of damages when the plaintiff's lost profit is not readily ascertainable because we find it not to be in accord with the authorities, which we find to support the better rule.
>
> Sandare argues that this court has previously adopted *section 774A* as the measure of damages in tortious interference cases [citations omitted] . . . We have examined all of theses cases and find that although the court in each case did rely on the *Restatement section 774A* as the measure of damages, none of the cases related to an issue as to whether the plaintiff might recover the defendant's lost profits where his own lost profit is not readily ascertainable.

Id.

In *Storage Tech. Corp. v. Cisco Sys., Inc.*, the United States Eighth Circuit Court of Appeals similarly ruled that restitution was an appropriate remedy for tortious interference with contractual relations; specifically, as to an employer's interference with the non-competition and non-disclosure covenants of a competitor's employees. 395 F.3d 921 (8th Cir. 2005). Like *Colorado Interstate Gas* and *Sandare Chem.*, the Eighth Circuit recognized that general tort

rules and the *Restatement (Second) of Torts* § 774A did not preclude recovery of a tortfeasor's ill-gotten gains.

In that case, the defendant corporation hired several former employees of the plaintiff in violation of what the Court determined as non-competition and non-disclosure covenants in favor of the plaintiff. *Id.* at 926. Noting Minnesota's adherence to the *Restatement (Second) of Torts* § 774A, the Court of Appeals held that where Minnesota courts had specifically contemplated restitution in cases of breached employment covenants and ancillary fiduciary duties, such a remedy was likewise appropriate against the employing tortfeasor. *Id.* at 925-26 (citing *Cherne Indus., Inc. v. Grounds & Assoc., Inc.*, 278 N.W.2d 81, 94-95 (Minn. 1979) (holding that "where an employee wrongfully profits from the use of information obtained from the employer, the measure of damages may be the employee's gain"). The Court ruled that "[w]hen the underlying wrong would have supported a claim of restitution, so should a claim for inducing that wrong." *Id.* at 925; *but see Natl. Merchandising*, 348 N.E.2d at 776 n. 16 (questioning the parity of tort and contract damages, particularly in aggravating circumstances); *Restatement (Second) of Torts* § 774A, comment d ("The action for interference with contract is one in tort and damages are not based on contract rules").

Accordingly, the Eighth Circuit concluded "that Minnesota courts would allow a restitutionary measure remedy in a case in which the interference alleged was inducing an employee's breach of noncompetition and nondisclosure covenants and fiduciary duties." *Id.* at 926.[17]

[17] The Eighth Circuit, however, ultimately rejected the plaintiff's request for damages on foundational grounds. *Id.* at 926-29. Specifically, the court did not find evidentiary support for the plaintiff's contention that the full purchase price for the defendant's subsequent acquisition was wholly attributable to the defendant's interference in hiring the employees. *Id.* Such issues of causation are not before the Court on this certification. Nonetheless, as summarized in the above *Statement of Relevant Facts*, ¶¶ 25-29, *supra*, TruGreen argues that it has presented sufficient evidentiary basis to support its claim for restitution of Respondents' ill-gotten gains during the prohibitory periods in question.

In *Zippertubing Co. v. TeleFlex Inc.*, the United States Third Circuit Court of Appeals ruled under New Jersey law that plaintiffs were properly awarded compensatory damages in an amount determined by the defendant tortfeasor's unlawful gains. 757 F.2d 1401 (3d Cir. 1985). The defendant, a supplier to the plaintiff-contractor and subcontractor, was found liable for tortious interference after contracting directly with the plaintiffs' customer. *Id.* at 1404-06. Under its original quotation to the plaintiff-subcontractor, the defendant would have earned significantly less revenue from the job at issue than what it eventually profited directly from the customer. *Id.* at 1406 (Under its quotation to Surf, Teleflex would have received $1,100,320.00 and made a net profit of $715,205. . . . Subsequent modifications to the Nab-Teleflex contract increased Teleflex's revenue to $3,259,248.00 and its profit to something in excess of $2,000,000."). Notwithstanding this significant increase, a jury awarded the plaintiffs $2,000,000 in compensatory damages. *Id.* at 1404.

On appeal, the defendant argued that the plaintiff's "disgorgement" theory for recovery of ill gotten profits could not be sustained under New Jersey law and that the lower court's award of damages was in error. *Id.* at 1406. While the plaintiffs presented sufficient evidence of a loss in anticipated profits, they had not attempted to establish the amount of such loss and instead had relied on the larger $2,000,000 amount profited by the defendant supplier as a result of its wrongdoing. *Id.* at 1411. Relying on constructive trust principles from early New Jersey opinions and other precedent concerning "the analogous business tort of misappropriation of business name," the Court upheld the award as "consistent with the policy of discouraging tortious conduct by depriving the tortfeasor of the opportunity to profit from wrongdoing." *Id.* (approving the lower court's jury instruction "to award such damages as would deprive the defendant of any unlawful benefit of its unlawful conduct").

2. Cases relied upon by Respondents do not address the issue of unjust enrichment or they deny the remedy on grounds distinguishable from this case.

Similar to the appellant in *Sandare*, the majority of cases relied upon by Respondents as authority for "limiting damages to lost profits" do not address whether a plaintiff can alternatively claim unjust enrichment or restitution as a remedy for tortious interference. *Defendants' Proposed Order Certifying Questions* (D. 287) at 8-9 n. 9. Many are limited in their opinion to strictly an analysis of lost profits where unjust enrichment was not claimed by the plaintiff as a damage remedy and consequently not discussed by the court.[18] What is more, due to the nature of many of these cases, the amount of the defendant's gains was not even in issue or of potential relevance.[19] Other cases preclude the plaintiff from recovery on other grounds.[20] As

[18] *KW Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1265, 1267 (M.D. Ala. 2001) (plaintiff claiming only lost profits resulting from defendant's tortious interference with prospective business relationships); *Magic Valley Truck Brokers, Inc. v. Meyer*, 982 P.2d 945, 951-52 (Idaho App. 1999) (plaintiff seeking damages for general decline in sales from experienced replacement); *Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d 754, 770-71 (Ill. App. 2004) (claim based on plaintiff's expert report of out-of-pocket and lost profits damages); *Burk v. Heritage Food Servs. Equip., Inc.*, 737 N.E.2d 803, 816-17 (Ind. App. 2000) (review of preliminary injunction and plaintiff's failure to provide any damage evidence at all); *Fowler v. Printers II, Inc.*, 598 A.2d 794, 806 (Md. Spec. App. 1991) (plaintiff seeking to recover only the profits lost on eight specific customer accounts solicited by defendant); *Excel Indus. Elecs. v. Blanco*, 1998 Mich. App. LEXIS 1824 (Mich. App. 1998) (plaintiff presenting only evidence of overall decrease in sales); *UZ Engineered Prods. Co. v. Midwest Motor Supply Co.*, 770 N.E.2d 1068, 1083 (Ohio App. 2001) (plaintiff's calculation of past and future losses attributable to defendant's tortious interference); *Clifford McFarland Read & Lundy, Inc. v. Brier*, 1998 R.I. Super. LEXIS 68 (R.I. Super. 1998) (plaintiff seeking compensatory damages for lost profits resulting from solicited customer and decrease in profit margin); *Lien v. Northwestern Engr. Co.*, 39 N.W.2d 483, 484-86, 489-90 (S.D. 1949) (plaintiff recovering lost profits it "might have made" on materials sold directly to defendant by owner in contravention of exclusivity agreement).

[19] *Innovative Fin. Servs., LLC v. Urban*, 2005 Conn. Super. LEXIS 775 (Conn. Super. 2005) (solicitation of employee by plaintiff's client for bookkeeping services); *Barlow v. Intl. Harvester Co.*, 522 P.2d 1102, 1107-09, 1117-18 (Idaho 1974) (employees and franchisor's disparagement of dealership owner resulting in termination of franchise and closure of business); *Rite Aid Corp. v. Lake Shore Investors*, 471 A.2d 735, 737 (Md. App. 1984) (lessee's interference with contract of lessor to sell property resulting in third-party's withdrawal from contract); *Potthoff v. Jefferson Lines, Inc.*, 363 N.W.2d 771, 773-744 (Minn. App. 1985) (former employer's interference resulting in termination of plaintiff's new employment); *D'Andrea v. Calcagni*, 723 A.2d 276 (R.I. 1999) (minority owners' interference resulting in termination of plaintiff's employment).

discussed *supra*, the fact that these cases, like Utah, generally recognize or adopt the *Restatement (Second) of Torts* § 774A does not dispose of the question of restitution.

Likewise, the cases which do confront the issue of unjust enrichment present facts and circumstances distinguishable from this case and make other considerations at odds even with Section 774A (for example, equating tort with contract damages). Although these courts decline to award unjust enrichment, each appears limited to the facts of the particular case and does not appear to impose the blanket prohibition suggested by Respondents.

In the decision of *Marcus, Stowel & Beye Govt. Sec., Inc. v. Jefferson* (a case specifically distinguished by *Sandare*, 820 S.W.2d at 24), the Fifth Circuit Court of Appeals ruled under Texas law that a plaintiff sales broker could not recover the full amount of profits received by the defendant from interference with the plaintiff's exclusive brokerage agreement. 797 F.2d 227 (5th Cir. 1986). Pursuant to that agreement, the plaintiff was authorized to act as the exclusive loan broker of a business for the sale of its mortgage portfolio and entitled to a specified sales commission. *Id.* at 229. When the defendant began actively soliciting purchasers and ultimately completed sales transactions in favor of the business and to the exclusion of the plaintiff, the plaintiff sought recovery against the defendant for tortious interference. *Id.* at 239-30. Specifically, the plaintiff sought damages based on the defendant's profits rather than the plaintiff's contract damages. *Id.* at 230.

In denying the plaintiff this relief, the Fifth Circuit observed that because the defendant under its own agreement with the business received twice the commission that the plaintiff would have received, the profits of the defendant materially exceeded the damages suffered by the plaintiff. *Id.* at 231 (respective agreements providing that plaintiff and defendant would earn

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[20] *Kforce, Inv. v. Surrex Solutions Corp.*, 436 F.3d 981 (8th Cir. 2006) (plaintiff precluded from pursuing separate cases against breaching employee and interfering employer); *Di Loreto v. Shumake*, 38 Cal. App. 4th 35 (Cal. App. 1995) (plaintiff precluded from pursuing emotional distress damages for tortious interference with prospective economic advantage).

one-half and one percent commissions). Because both damages and profits were directly determinable by the parties' respective agreements, the Court expressly limited the plaintiff's recovery to contract damages notwithstanding the claim's foundation in tort. *Id.* (citations to Texas authorities omitted). Consequently, under the general contract theory that "the injured party [be placed] in the same economic position it would have been in had the contract not been breached," the Court rejected a disgorgement of the defendant's profits and limited the plaintiff's recovery to the lost commissions specified in its own agreement. *Id.* (further commenting on the argument of efficient breach and the availability of punitive damages for "particularly egregious" conduct). However, as distinguished by *Sandare*, *supra*, the Court specifically reserved any opinion on "whether Texas courts would permit recovery based on [a] defendant's profits where [the] plaintiff's loss could not be directly determined." *Id.* at n. 5 (citing *Natl. Merchandising*, 348 N.E.2d 771, and the Massachusetts' court "need" in looking to the defendant's profits "given the difficulty of determining the plaintiff's losses").

Since *Marcus*, Texas law has also clarified that the measure of damages for breach of contract and tortious interference with contract may not necessarily be the same. *Sulzer Carbomedics v. Oregon Cardio-Devices, Inc.*, 257 F.3d 449, 455-56 (5th Cir. 2001) (citing *Restatement (Second) of Torts* § 774A, comment d).

In *Am. Air Filter Co., Inc. v. McNichol*, the United States Third Circuit Court of Appeals also declined to apply unjust enrichment against an interfering tortfeasor under general contract principles. 527 F.2d 1297 (3d Cir. 1975). In a suit initiated against a former employee and his new employer, the plaintiff charged the two defendants with breach of contract and tortious interference, respectively, for violations of a restrictive covenant in an employment contract. *Id.* at 1298. Pointedly, the new employer had no knowledge of the restrictive covenant prior to its hiring of the employee. *Id.* at 1299. Applying either Kentucky or Pennsylvania law, the Court

of Appeals upheld the trial court's refusal to impose an accounting for profits on the defendant employer. *Id.* at 1300.

However, in reaching this decision, the Court expressly confined its opinion to the plaintiff's "pecuniary losses" despite noting a divergence of potential tort remedies comparable to the *Restatement (Second) of Torts* § 774A.[21] *Id.* ("In this case, there are no injuries alleged other than pecuniary losses resulting from McNichol's employment with Scanlan."). Like *Marcus*, the Court determined that "[i]n these circumstances [of a single employee's breach and an employer's unknowing interference], the measure of damages for interference with contractual relations [would] be identical to that for breach of contract." *Id.* (emphasis added). Consequently, the Court reasoned:

> To compel defendant to disgorge these profits could give plaintiff a windfall and penalize the defendant, neither of which serves the purpose of contract damages.

Id. (further noting "that a defendant's profits are not the measure of a contract plaintiff's losses") (emphasis added).

In *Developers Three v. Nationwide Ins. Co.*, the Ohio Court of Appeals also declined to adopt an unjust enrichment measure of damages in what the Court determined was a claim for tortious interference. 582 N.E.2d 1130, 1133 (Ohio App. 1990) ("we can best characterize plaintiff's claim as one for tortious interference"). At issue was the plaintiff's sale of certain options to the defendants for purchase of real estate. *Id.* at 1131. The plaintiff, represented by a dissatisfied partnership interested, claimed the defendants wrongfully induced the plaintiff's partners into breaching fiduciary duties and selling the options. *Id.* at 1133. In its action against the defendants, the plaintiff explicitly disclaimed a measure of damages based upon its lost profits or lost expectancy and argued that irrespective of amount restitution of the defendants'

[21] Providing "the pecuniary loss of the benefits of the contract" as only one of the available damages for tortious interference.

profits was justified. *Id.* at 1132. The defendants, however, challenged the appropriateness of this remedy and argued that because the plaintiff did not have the same ability as defendants to develop the property in question, the plaintiff's actual loss was much less than the defendant's gain. *Id.*

In reaching its decision to deny the plaintiff relief, the Court of Appeals considered at length the pros and cons of allowing an award of damages based upon a theory of unjust enrichment. *Id.* at 1133-36 (citing among other authorities *Natl. Merchandising*, 348 N.E.2d at 775-76; *Fed. Sugar Refining*, 268 F. at 582-83; *Zippertubing*, 757 F.2d at 1411-12; *Am. Air Filter*, 527 F.2d at 1300). Ultimately, however, the Court held that it was "reluctant to abandon a purely compensatory damage formula unless policy and precedent clearly support[ed] an unjust enrichment theory of recovery," which the Court concluded in that particular instance did not. *Id.* at 1135 ("We conclude that neither supports such a recovery in this instance."). Specifically, similar to *Marcus*, the Court reasoned that in appropriate cases, punitive damages would serve the same function as an unjust enrichment recovery, and that precedent, such as *Natl. Merchandising* and *Zippertubing*, did not squarely confront the particular "windfall" problem before the Court; namely, "of a plaintiff recovering the defendant's profits that [undisputedly] exceed the plaintiff's actual loss."[22] *Id.* Consequently, the Court decided that the "plaintiff's

[22] Though *Natl. Merchandising* did in fact address the flipside argument that "[n]or should a defendant be heard to say that the unjust enrichment measure is unfairly 'punitive' because the plaintiff may recover more than his exact loss, when use of a [conventional] tort measure might allow the defendant to retain some part of his ill gotten gains." 348 N.E.2d at 433. And *Zippertubing* did uphold a complete disgorgement of profits notwithstanding the fact that because of outsourcing to the defendant the plaintiffs would have contracted for significantly less lost profits. 757 F.2d at 1406; *see also Restatement (Second) of Torts* § 774A, comment c (commenting that "[a] major problem with damages [resulting from interference with contract relations] is whether they can be proved with a reasonable degree of certainty," and that "due weight [may be given] to the fact that the question was [only] 'made hypothetical by the very wrong' of the defendant.").

correct measure of damages in this tortious interference action" was the plaintiff's loss and not the defendant's gain. *Id.* at 1136 (emphasis added).

Since the *Developers Three* decision, however, the Ohio Court of Appeals has limited this ruling and recognized that in certain circumstances, "an accounting of the tortfeasor's profits" would be appropriate. *See Try Hours, Inc. v. Swartz*, 2007 Ohio 1328 (Ohio App. 2007) (finding "support in Ohio for using an accounting of the tortfeasor's profits, gained through misappropriation of trade secrets, breaches of fiduciary or confidential relationships, and breaches of non-competition agreements, in calculating a business's damages"); *Miller Med. Sales, Inc. v. Worstell*, 1993 Ohio App. LEXIS 6251 (1993) ("We do not disagree with the contention that plaintiff would be entitled to the higher amount of either plaintiff's lost profits or defendant's gain.").

B. Based on the interests and circumstances of this case, TruGreen should be permitted to recover the gains realized by Respondents for tortiously inducing breaches of the Non-Compete Agreements and interfering with TruGreen's economic relations.

TruGreen seeks damages incurred as a result of Respondents' inducement of massive breaches of the Non-Compete Agreements and interference with TruGreen's economic relations. *See Amended Complaint* (D. 115) at ¶¶ 126-138. At the heart of this contention is Respondents' ability to purloin a ready-made management and sales force and within weeks create an efficiently operated business model fashioned in the mold of TruGreen. *See Statement of Relevant Facts* at ¶¶ 9-15, 24-29, *supra*. As alleged, this interference has resulted in a realization of significant revenue gains to Respondents and correspondingly diminished sales performance by TruGreen. *See id.* at ¶¶ 24-26; Exhibit J to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) ("Thank our reps and sales managers [i.e., former TruGreen reps and sales managers] for not turning in a $228,000 and getting us near to the near $900,000 mark through February!"). With respect to all Utah-related claims, the contractual covenants

negotiated by TruGreen as protection against this very occurrence remain at issue before the District Court, as do the overarching tort claims precipitating their mass breach. *Order Addressing Certification* (D. 275) at 1. Like the above cases that affirm restitution damages, here, the following considerations merit an affirmative response to Certified Question No. 2.

1. The special interests of this case are comparable to other "business torts" which permit restitution of a defendant's ill-gotten profits.

As the facts and history of this case demonstrate, an award of unjust enrichment would be well aligned with the remedies available for similar business torts. *See Natl. Merchandising*, 348 N.E.2d at 775 ("an approximation of the defendant's 'unjust enrichment'—often joined with an injunction, has been a well understood feature of actions for 'business torts' such as unfair competition (passing off) and trade name, trademark, and copyright infringement"); *see also Storage Tech.*, 395 F.3d at 925; *Zippertubing*, 757 F.2d at 1411. Under statutorily prescribed remedies and other authorities, damages for misappropriation of trade secrets, for example, can include both actual losses and the defendant's unjust enrichment. *See e.g. Water & Entergy Sys. Tech. v. Keil*, 48 P.3d 888, 894 (Utah 2002) (relying on Utah Code Ann. § 13-24-4)[23]. Where contractually defined "confidential information" is only one step removed from a "trade secret," *see Medspring Group, Inc. v. Feng*, 368 F. Supp. 2d 1270, 1279 (D. Utah 2005), there is authority that the same damage remedy applies. *See Restatement (Second) of Agency* § 396 (1958) ("Unless otherwise agreed, after the termination of the agency, the agent . . . has a duty to account for profits made by the sale or use of trade secrets and other confidential information"[24]); *see also Dubuque Prod., Inc. v. Lemco Corp.*, F. Supp. 108, 123 (D. Utah 1983) (with respect to

[23] "Damages can include both the actual loss caused by misappropriate and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss."

[24] *See also* comment g, "Trade secrets *and other similar private information* constitute assets of the principal. Their subsequent use by a former agent is as improper as the use of other assets, and, whether or not the use is in competition, it is the basis for a *restitutional claim* . . ." (Emphasis added).

a business tort, a plaintiff may recover "profits retained by the defendant . . . by reason of the breach of confidential information and unfair competition"). Furthermore, and important to circumstances here, case law permits an employer to protect against and recover for the loss of a broader range of customers than simply past and existing contacts when additional and correspondingly broader protectable interests are at issue, including confidential information and employee investment. *See e.g. Intermountain Eye & Laser Centers, P.L.L.C. v. Miller*, 127 P.3d 121, 129 (Idaho 2005) ("that employers are entitled to protect themselves from competition for their existing or past customers cannot necessarily be extrapolated to mean those are the only customers that an employer can protect"). Accordingly, as captured in the *Restatement of the Law, Restitution* § 136 (1937), when "[a] person who has tortiously used a trade name, trade secret, franchise, profit a prendre, *or similar interest of another*, [he] is under a duty of restitution for the value of the benefit thereby received." (Emphasis added).

Here, TruGreen's claim may be viewed as one for impairment of goodwill, exploitation of confidential information and overall interference with the legitimate expectations of TruGreen in preserving an experienced management and sales force against the predatory onslaught of a competitor. Such interests lie close to the business torts mentioned above and would merit application of a similar restitutionary measure for Respondent's tortious interference. *See Natl. Merchandising*, 348 N.E.2d at 775.

2. The damages resulting from Respondents' interference and inducement of breaches of the Non-Compete Agreements are not readily ascertainable and merit a restitutionary measure.

The fact that TruGreen may be unable to quantify with ready precision the damages resulting from Respondents' interference and inducement of breaches of the employee Non-Compete Agreements does not render TruGreen's damages illusory or insignificant. *Order Addressing Certification* (D. 275) at 2 ("[T]he court believes that TruGreen has proven the fact

of damages but that questions remain as the amount of damages"). Indeed, the difficulty of measuring such pecuniary losses expressly formed one of the bases for TruGreen's preliminary request for injunctive relief. *See Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004) (listing among other factors an "inability to calculate damages" as supporting a determination of irreparable harm for preliminary injunction); *Reply Memorandum in Support of Plaintiffs' Motion For Preliminary Injunction* (D. 77) at 23. This reality of circumstance is neither unique to TruGreen nor unusual of restrictive covenants in general, as evidenced by the parties' respective contracting language and cases of this Court which have addressed the issue:

> In the event of breach or threatened breach by me of any provision of this Agreement, the damages which TruGreen might suffer would be difficult or impossible to measure, and therefore, TruGreen shall be entitled to an injunction . . . Nothing herein shall be construed as prohibiting TruGreen from pursuing any other remedies available to it for such breach or threatened breach including, but not limited to, *the recovery of damages from me in an amount equal to the revenues gained by or from the breach.*

Exhibit A5 to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) (Non-Compete Agreement of Respondent Jim LeBlanc executed in favor of TruGreen) (emphasis added).

> In the event of a breach or threatened breach by me of any provision of the Agreement, the damages which SLS [Scotts Lawn Service] might suffer would be difficult or impossible to measure and, therefore, SLS shall be entitled to an injunction . . . Nothing herein shall be construed as prohibiting SLS from pursuing any other remedies available to it for such breach or threatened breach including, but not limited to, *the recovery of damages from me in an amount equal to the revenues gained by or from the breach.*

Exhibit B5 to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) (Non-Compete Agreement of Respondent LeBlanc executed in favor of Respondent Mower Bros./Scotts) (emphasis added); *see also Systems Concepts*, 669 P.2d at 427-28 (recognizing for purposes of injunctive relief "irreparable injury" as "[w]rongs . . . which occasion damages that

are estimated only by conjecture, and not by any accurate standard," including misappropriation of confidential information and goodwill).

More than creating a potential for injunctive relief, where the lost profits suffered by TruGreen "are not readily ascertainable,"[25] this Court would be justified in following the reasoning of *Sandare* and *Natl. Merchandising* and permitting a restitutionary measure of damages for Respondents' tortious interference with TruGreen's contractual and economic relations (Utah's past recognition of the *Restatement (Second) of Torts* § 774A notwithstanding). *Sandare*, 820 S.W.2d at 23-25, *Natl. Merchandising*, 348 N.E.2d at 776 ("Need and reason combine to support this avenue of recovery [under an unjust enrichment measure], because it will often be difficult to satisfy strictly a conventional tort formula"). Unlike the circumstance of *Marcus*, 797 F.2d at 229-30, the adjudicator of TruGreen's tort claims cannot look to the interfered contracts or other written instrument for a ready measure of lost profits damages. (Although both TruGreen and Scotts do seemingly agree that "the revenues gained by or from the [underlying] breach[es]," *supra*, would be an adequate substitute). Notwithstanding that calculating such damages in this case is expressly recognized as an "extremely difficult" undertaking, this reality should not be construed as a continued basis for denying TruGreen relief or adding insult to injury in favor of Respondents. *June 8 Summary Judgment Order* (D. 286) at 9. Indeed, due weight must be given to the consideration that the Certified Question before this Court was only "made hypothetical by the very wrong" of Respondents and not the other way around. *Restatement (Second) of Torts* § 774A, comment c.

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[25] Though the District Court presumptively concluded that TruGreen's damages are in some degree calculable, it by no means made a determination that damages were "readily ascertainable" in denying injunctive relief. *See Order Denying Preliminary Injunction* (D. 112) at 1 (holding "that injunctive relief is not warranted here because money damages [in some form] can compensate TruGreen for any breaches."). In fact, the District Court has expressly declared otherwise. *See June 8 Summary Judgment Order* (D. 286) at 9 ("The court recognizes that calculating damages in these types of cases can be extremely difficult").

Consistent with authorities such as *Natl. Merchandising* and *Sandare*, therefore, policy and precedent support an unjust enrichment theory of recovery in this instance.

3. Restitutionary damages against Respondents would not create a prima facie "windfall" in favor of TruGreen.

Although *Developers Three* indicated that compelling a defendant "to disgorge [its] profits could give [a] plaintiff a windfall and penalize the defendant," 582 N.E.2d at 1134 (quoting *Am. Air Filter*, 527 F.2d at 1300), other courts equally consider that "a defendant [should not] be heard to say that the unjust enrichment remedy is unfairly 'punitive' because the plaintiff might recover more than his exact loss, when use of a [conventional] tort measure might allow the defendant to retain some part of his ill gotten gains." *Natl. Merchandising*, 348 N.E.2d at 776.

What is more salient to this case, however, and equally distinguishable from cases like *Developers Three*, is that an award of restitutionary damages would not create a prima facie windfall in favor of TruGreen. Again, unlike *Marcus*, 797 F.2d at 231, there is no underlying instrument to cap liability at something TruGreen "would have received" absent Respondents' interference. And it is far from undisputed that Respondents' success is wholly attributable to some detached source or Respondents' unique capabilities. *Contrast Developers Three*, 582 N.E.2d at 1132 (argument that plaintiff did not have defendants' ability to develop the property in question). Rather, the immediate success of Respondents (at least according to regional marketing manager Mantz) is wholly attributable to former TruGreen sales managers and representatives now employed with Respondents. *See* Exhibit J to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) ("Thank our reps and sales managers for not turning in a $228,000 and getting us near to the near $900,000 mark through February!").

Moreover, "once a defendant has been shown to have caused a loss, . . . the reasonable level of certainty required to establish the *amount* of a loss is generally lower than that required

to establish the *fact* or *cause* of a loss." *Sampson*, 770 P.2d at 1007 (quoting *Cook Assocs., Inc. v. Warnick*, 664 P.2d 1161, 1166 (Utah 1983)) (emphasis in original). Here, TruGreen has already established (for purposes of this certification) that Respondents have caused a loss and consequently it is Respondents "who must assume the risk of some uncertainty" in fashioning an appropriate remedy. *Id.* (quoting *Bastian v. King*, 661 P.2d 953, 957 (Utah); *Order Addressing Certification* (D. 275) at 2 ("[T]he court believes that TruGreen has proven the fact of damages but that questions remain as the amount of damages"). As the above-stated facts indicate, TruGreen has adequately claimed a rational basis between the unprecedented gains of Respondents and the departure of its management force and veteran sales employees. *See Statement of Relevant Facts* at ¶¶ 25-27, *supra*. And in applying an unjust enrichment measure there is nothing unreasonable in taking the gross "tainted" sales of Respondents under the management of individuals like Mantz as TruGreen's damages. *See Nat. Merchandising*, 348 N.E.2d at 774-75 (damages measured as a percentage of sales[26] made by defendant under the breaching employee's managership).

4. Given the nature of the intentional torts precipitating the respective contract breaches, the Court should not restrict TruGreen to strictly a "lost profits" contract measure of damages.

Especially pertinent to this case is the *Natl. Merchandising* puzzlement that the same measure of lost profits damages should always apply to one who tortiously induces a breach of contract as to one who actually commits the breach; "particularly in an aggravated case like the present where the defendants contrive deceptively to create the opportunity for massive breaches of contract . . . by a number of other persons." 348 N.E.2d at 776 n. 16. After all, at least with respect to consequential damages, the position of the *Restatement (Second) of Torts* § 774A is clear:

[26] Under *Natl. Merchandising*, there is further authority that this percentage of sales or profit margin of the defendant tortfeasor can be based on that of the plaintiff. 348 N.E.2d at 775 n. 9.

> The action for interference with contract is one in tort *and damages are not based on the contract rules*, and it is not required that the loss incurred be one within the contemplation of the parties to the contract itself at the time it was made.

Commend d (emphasis added); *see also Sampson*, 770 P.2d at 1007; *Colorado Interstate Gas*, 661 F. Supp. at 1479 ("Damages for tortious interference are based in contract, not tort.").

Given the sheer number of departed employees and management personnel, this action is not, suffice it to say, a case of *Am. Air Filter* and a single departed salesman employed in ignorance of a restrictive covenant. 527 F.2d at 1299-1300 (restricting damages against the unknowing employer to the same contract damages measured against the breaching employee). And "the purpose of contract damages" heavily considered in that case becomes less relevant in light of the fact that TruGreen never had an opportunity to contemplate in contract the size and scope of the induced employees' mass breaches and departure. *Id.* at 1300.

The consciousness and scope of interference displayed by Respondents merits recognition of a damage measure independent of the contract breaches induced. Even more so, considering that punitive damages in this case are uniquely unavailable[27] to "counterbalance" the preclusion of an unjust enrichment theory. *See Developers Three*, 582 N.E.2d at 1135 (citing *Marcus*, 797 F.2d at 232).

In summary to Certified Question No. 2, therefore, the counsel of *Natl. Merchandising* is well taken in this case that an intending tortfeasor like Respondents should not be prompted to speculate on profits exceeding TruGreen's losses or that alternative relief will be unavailable. 348 N.E.2d at 776; *see Statement of Relevant Facts* ¶ 12, *supra* (disputed testimony regarding

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[27] *Feb. 13 Summary Judgment Order* (D. 253) at 43-44 (District Court's denial of punitive damages); *but see* T. Leigh Anenson, *Litigation Between Competitors With Mirror Restrictive Covenants: A Formula For Prosecution*, 10 Stan. J.L. Bus. & Fin. 1, 14-17 (2005) (addressing the hypocrisy of a defendant employer's own use of restrictive covenants in its employment contracts as potential justification for an award of punitive damages for tortious interference); Exhibit B5 to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178) (mirror restrictive covenants executed by Respondents).

Respondents' intention to sell back Scotts franchises at an inflated value). Based on the interests and circumstances described above, the Utah Supreme Court should answer that TruGreen be permitted to recover the gains realized by Respondents for tortiously inducing breaches of the Non-Compete Agreements and interfering with TruGreen's economic relations.

II. The Court should answer in the affirmative to Certified Question No. 1 that Utah law recognizes an unjust enrichment measure of damages for a former employee's breach of non-competition, non-disclosure, and employee non-solicitation contract provisions.

That contract damages are generally compensatory and not restitutionary is Hornbook law. The actualities of current contracting practices, however, have prompted modern courts to venture beyond compensatory damages in fashioning remedies. Contracts have become more dynamic as parties search for new ways to minimize risk. This evolution in types of contracts is prompting a sea change in the contract theory of damages. This phenomenon has happened before, most notably with respect to the reliance interest. The *First Restatement of Contracts* recognized only three theories of damages: expectation, benefit conferred, and specific performance. Reliance, now recognized in the *Restatement (Second) of Contracts* § 344 and duly accepted, was not. *See generally* Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 Mich. L. Rev. 559, 561-566 (Dec. 2006).

Although the *Restatement (Second) of Contract* espouses the "classical" compensatory and expectation measure of damages, it does not preclude other measure of damages. It is the other measures of damages (including the damages spoken of in terms of "unjust enrichment," "disgorgement" and "restititution") that more ably track the changes in contract law designed to protect legitimate business interests; namely non-competition, non-disclosure and non-solicitation agreements.

A breach of these agreements indicates that the breaching party has done exactly what it contracted not to do. Often, as in this case, this breach is "opportunistic" or "efficient," meaning

that "the defendant, by electing to breach, is attempting to improve on the terms of the contractual exchange, managing either to give less or take more than the parties had agreed." Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 Tex. L. Rev. 2021, 2021 n. 1 (June 2001). Compensatory or expectation damages fail to acknowledge the nature of these breaches due to the difficulty of determining damages. Any assumed or illusory restrictions against employing a restitutionary or disgorgement measure of damages based on the breaching party's profits only exacerbates the problem. By failing to employ a disgorgement measure of damages, the courts reward the breaching party by allowing it to retain all benefits in excess of its damages. Why then is the disgorgement remedy not seen more often in contract law? It is not because the Courts lack the authority to do so or contract law forbids it. It is because "in most cases either there is no gain to be disgorged, disgorgement is unnecessary, or disgorgement is inappropriate for special moral or policy reasons." Eisenberg, *supra*, at 599. A "violation of [a] covenant not to compete" is a "perfect example of this form of [opportunistic] breach" where disgorgement would be justified. *Id.* at 2049-2050.

Consistent with these arguments the Court should respond to Certified Question No. 1 in favor of TruGreen. As evidenced by the parties' protracted litigation on enforceability, the legitimate business interests which underlie these Agreements fall in line with the same interests justifying restitution in cases of tortious interference and other "business torts." *See e.g. Natl. Merchandising*, 348 N.E.2d at 775. Moreover, while many cases appear to consider only a plaintiff's "lost profits" as the sole measure of damages for breach of a restrictive covenant, courts have attempted to fit the proverbial square peg of "lost profits" into the round hole occasioned by a breach of one of these non-solicitation, non-compete or non-disclosure agreements. In so doing, they have attempted to mold the lost profits measure to fit the situation in different ways such as recognizing a breaching party's gains as a proxy or surrogate for

estimating these losses. Instead of attempting to shape a lost profits measure of damages to reflect the unjust gains of the Defendant, the Court should just recognize a restitutionary/disgorgement measure of damages. For these reasons and the fact that the parties mutually recognize a calculation of damages as the "revenues gained by or from" the respective breaches, the Court should answer that disgorgement, restitution or unjust enrichment damages are available for a former employees' breach of restrictive covenants.

A. Some states permit restitution for breaches of non-competition or non-disclosure covenants.

Similar to the special interests justifying restitution damages for "business torts," *supra*, courts in some jurisdictions recognize restitution as an appropriate remedy for breaches of non-competition and non-disclosure covenants. *Storage Tech.*, 395 F.3d at 925 (stating under Minnesota law that "breach of some covenants and duties attendant on the employment relation entitled the aggrieved employer to restitution"). Specifically, courts in these cases have held that "where an employee wrongfully profits from the use of information obtained from his employer, the measure of damages may be the employee's gain." *Id.* (quoting *Cherne*, 278 N.W.2d at 94-95). This assessment is in accord with existing Utah law in similar contexts which permit a measure of damages based upon the defendant's unjust enrichment for compromised confidential information and trade secrets, and breaches of fiduciary duties. *See Water & Entergy Sys.*, 48 P.3d at 894; *Prince, Yeates & Geldzahler v. Young*, 94 P.3d 179, 186 (Utah 2004); *see also Restatement (Second) of Agency* § 396 ("after the termination of the agency, the agent [which would included an employee] . . . has a duty to account for profits made by the . . . use of . . . confidential information.").

Here, breaches of the employee non-disclosure covenants and non-competition covenants (of which protection of confidential information is a legitimate interest) remain at issue. In

accordance with the above authorities, therefore, there is justification for the Court to allow a restitutionary remedy for Respondents' breaches of contract.

B. Courts often use a breaching party's gains as a proxy for calculating damages in cases of breached non-competition agreements.

Several jurisdictions that apply the rhetoric of "lost profits" as the proper damage remedy for breach of a non-competition contract actually use the competitor's or breaching employee's gains as a surrogate or proxy for estimating a non-breaching party's lost profits.[28] Speaking about both damages for tortious interference and breach of a non-competition agreement, for example, the court in *KW Plastics v. United States Can Co.* has stated that lost profits could be proved through such evidence as:

> (1) a comparison of the experience of the plaintiff's own business before and after the interruption of its progress by the defendant's wrongful acts; (2) the plaintiff's subsequent experience after the wrongful interference with the business has been eliminated; (3) the experience of comparable businesses engaged in the same activity; (4) *the defendant's subsequent profit from enjoyment of a comparable opportunity* . . .

131 F.Supp. 2d 1265, 1269 (D. Ala. 2001) (stating also that "[t]here is no one correct way for proving damages") (emphasis added). This willingness to use a breaching defendant's gains as a measure of a plaintiff's damage is evident in numerous cases which nonetheless overtly state that the proper measure of damages is lost profits.[29] The rationale for using the defendant's gain is

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[28] See Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 Mich. L. Rev. 559, 588 (Dec. 2006) (noting that "there is a line of cases concerning damages where the defendant has wrongfully competed with the plaintiff, in breach of a noncompete agreement . . . [and] courts have awarded the plaintiff damages based on the defendant's profits . . . [or] the disgorgement measure [of damages] has been used as a surrogate for the expectation measure.").

[29] *See e.g. Natl. Micrographics Sys., Inc. v. OCE-Indus., Inc.*, 465 A.2d 862, 869 (Md. 1983) (quoting Professor Corbin, 5 Corbin, Contracts, § 1025 ("it is permissible to use the principal's sales to estimate the agent's lost profits . . . [as] proof of the sales made and business done . . . by the principal or his agent after the breach, may be such as to 'make possible a reasonably accurate estimate of the commissions that the agent has been prevented from earning.'"); *The Lenco Pro, Inc. v. Guerin*, 1998 Mass. App. Div. 10 (Mass. App. Div. 1998) ("the trial judge would have been justified on the record before us, in calculating [the plaintiff]'s lost profits based upon all the profits from all consultants placed by [defendant]."); *Wirum & Cash v. Cash*, 837

that it may be difficult to measure a plaintiff's lost profits due to the breach of a non-competition agreement and "'a more appropriate measure of damages might be that grounded' on the defendant's 'actual experience for the [post-breach] period *rather than one based on extrapolating profits* from the results experienced' by the plaintiff in the prebreach period." *Fowler v. Printers II, Inc.* 598 A.2d 794, 808 (Md. Ct. 1991) (quoting *Macke Co. v. Pizza of Gaithersburg Inc.*, 270 A.2d 645 (Md. 1970) (emphasis in the original).

Here, as discussed, given the nature of the breaches of contract and the potentially limitless ability to speculate on intervening causes, damages are extremely difficult to calculate. Accordingly, a more appropriate measure of damages might be grounded on Respondents' actual gains achieved while employed with Mower Bros./Scotts.

C. The "liquidated damages covenants" contained in TruGreen's Non-Compete Agreements operate as a contractual measure of restitution.

Even in states which seemingly prohibit restitution in non-competition cases, *see e.g. Am. Air Filter*, 527 F.2d at 1299-1301, courts still uphold liquidated damages clauses that award disgorgement of the breaching party's profits.

In *Omicron Sys., Inc. v. Weiner*, the Pennsylvania Superior Court upheld the trial court's award of an "equitable accounting" of the defendant's gross earnings for breaches of a covenant not to compete. 860 A.2d 554, 565-66 (Pa. Super. 2004). In that case, the defendant was found liable for breach of a two-year restrictive covenant that prohibited the defendant from leaving the plaintiff's employ and working for a competitor. *Id.* at 557. As part of the breached covenant, the defendant agreed that the plaintiff would be entitled to injunctive relief "as well as damages

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P.2d 692 712 (Alaska 1992) ("a court can consider the profit of the breaching party . . . [as] the breaching party's profits can be a reasonable basis for estimating plaintiff's damages."); *North Pac. Lumber Co. v. Moore*, 551 P.2d 431, 435-436 (Or. 1976) ("We agree with the trial court that [competitor's] profits from such sales are a reasonable basis for estimating plaintiff's damages."); *Merager v. Turnbull*, 99 P.2d 434, 439 (Wash. 1940) ("Those gains [to the defendant] may be considered in awarding damages.").

and an equitable accounting of all earnings, profits and other benefits arising from such violation . . ." *Id.* at 565. Interpreting this provision as a liquidated damages clause, the appellate court upheld the award, holding that the defendant agreed to an accounting of profits when he signed the agreement. *Id.* at 565-66 (further holding that the defendant's gross income was the proper measure).

As indicated *supra*, in this case, both parties have adopted similarly worded clauses to recover "damages from [breaching employees] in an amount equal to the revenues gained by or from the breach." *See e.g.* Exhibits A5 and B5 to *Memorandum in Support of Plaintiffs' Motion For Summary Judgment* (D. 178). Viewing these as liquidated damages clauses, such are enforceable under Utah law as long as (i) "revenues gained" by the employee-Respondents are reasonable forecasts of just compensation to TruGreen and (ii) actual damages are incapable or very difficult of accurate estimation. *Reliance Ins. Co. v. Utah Dept. of Transp.*, 858 P.2d 1363, 1366-67 (Utah 1993) ("Whether an amount [is] a reasonable forecast is determined by looking at the contract, not at the time of its breach, but rather at the time of its formation.") (citing *Robbins*, 645 P.2d at 626). Where the District Court has made no finding that these covenants are liquidated damages clauses,[30] the Court should answer Certified Question No. 1 in the affirmative that like *Omicron* an accounting of the Respondents' revenue gains is an appropriate damage remedy provided the above conditions of enforceability are met. *See June 8 Summary Judgment Order* (D. 286) at 9 ("The court recognizes that calculating damages in these types of cases can be extremely difficult").

[30] *Motion Hearing Transcript* (D. 271) at 63:4-5 ("*Robbins v. Finlay* and the liquidated damages case that doesn't seem to me to speak to that.").

CONCLUSION

Against the District Court's certification "that TruGreen has proven the fact of damages"[31] and for the reasons set forth herein, therefore, TruGreen respectfully requests that the Utah Supreme Court answer in the affirmative to Certified Question No. 2 that Utah law recognizes an unjust enrichment measure of damages for tortious interference with a competitor's contractual and economic relations. Notwithstanding the conventional tort remedies described in the *Restatement (Second) of Torts* § 774A, restitution is not precluded as an appropriate measure of damages and would be justified in this case of mass interference because (1) the interests harmed by Respondents are comparable to other business torts which permit restitution, (2) the actual losses incurred by TruGreen are not readily ascertainable, (3) an award of Respondents' ill-gotten gains would not create a prima facie windfall in favor of TruGreen, (4) TruGreen's claims against the interfering Respondents sound in tort, not contract, and (5) Respondents should not be allowed to speculate that gains will exceed TruGreen's losses.

Additionally, with respect to Certified Question No. 1, TruGreen also respectfully requests that the Court answer in the affirmative that Utah law recognizes an unjust enrichment measure of damages for a former employee's breach of restrictive covenants. The *Restatement (Second) of Contracts* is silent with respect to the use of a restitutionary measure of damages as referenced in this case. Courts have recognized that "classic" compensatory contract damages often fail to address the harm caused by a breach of a contract designed to protect legitimate business interests such as non-compete, non-disclosure and non-solicitation agreements. Moreover, in recognizance of this principle, courts which on their face appear to limit a plaintiff's recovery to "lost profits" nonetheless shape this theory to address the ill-gotten gains

[31] *Order Addressing Certification* (D. 275) at 2.

of the breaching defendant by using the breaching defendant's gains as a proxy or surrogate to measure damages. Where the parties in this case have additionally attempted to provide for recovery of gains realized by or through the respective breaches, the "liquidated damages clauses" of the Non-Compete Agreements should be conditionally accepted as a restitutionary measure.

DATED this 9th day of November, 2007.

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ADDENDUM

Pursuant to Utah R. App. P. 24(a)(11)(C), copies of the District Court's *Order Addressing Certification*, March 6, 2007, (D. 275) and *Order Certifying Questions of Law to the Utah Supreme Court*, June 8, 2007, (D. 287) are submitted herewith.

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION

TRUGREEN COMPANIES, L L C , a Delaware limited liability company, et al , Plaintiffs, v SCOTTS LAWN SERVICE, et al , Defendants	**ORDER ADDRESSING CERTIFICATION** Case No 1 06CV00024

In an effort to provide the parties with further guidance on the certification briefs, the court furnishes the following information The court anticipates that it will issue an order within the next two weeks granting summary judgment to all the Idaho defendants on all remaining claims With respect to Mower Brothers, Scotts, Greenside, Bitton, and Babilis (collectively "Scotts Defendants"), the court believes that it will grant them summary judgment on the claims against them that allegedly took place in Idaho Consequently, the court anticipates that the remaining claims and defendants in this case will be as follows

1 *Breach of Non-Competition Covenant Gaythwaite and LeBlanc,*
2 Breach of Confidentiality Provision Mantz, Gaythwaite, LeBlanc, and Stephensen,
3 Breach of Non-Interference Provision Mantz and Gaythwaite,
4 Interference with Contractual Relations Scotts Defendants (as to Utah claims), Mantz and Gaythwaite,
5 Interference with Economic Relations Scotts Defendants (Utah claims),
6 Unfair Competition Scotts Defendants (Utah claims)

As a backdrop for the certification issue, the court believes that TruGreen has proven the fact of damages but that questions remain as to the amount of damages. The court finds that it is unclear whether Utah law would allow for an "unjust enrichment" measure of damages on the remaining claims. Accordingly, the court is prepared to certify to the Utah Supreme Court the legal question(s) of whether a defendant who breaches the contract provisions and/or commits the torts listed above can be required to account for his profits under Utah law.

The parties have been directed to provide the court with a proposed order of certification. These "briefs" should not argue the merit of these issues but rather should focus on the certification vehicle. The format of the *Egbert v. Nissan* certification order (case no. 2:04-cv-551, docket no. 277) is illustrative of the type of order the court plans to issue. The parties will have until Friday, March 16, 2007, to file their proposed orders of certification, not to exceed ten pages in length. Any reply will be due Friday, March 23, 2007, and shall not exceed five pages in length.

SO ORDERED.

DATED this 6th day of March, 2007.

BY THE COURT:

Honorable Paul G. Cassell
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION

TRUGREEN COMPANIES, L.L.C., a Delaware limited liability company, et al., Plaintiffs, v. MOWER BROTHERS, INC., a Utah corporation, et al., Defendants.	**ORDER CERTIFYING QUESTIONS OF LAW TO THE UTAH SUPREME COURT** Case No. 1:06CV00024 PGC

The impetus for this certification is a dispute over the proper measure of damages for the breach of an employment agreement, tortious interference with contractual and economic relationships, and violation of Utah's Unfair Competition Act. Plaintiffs TruGreen Companies, L.L.C., and TruGreen Limited Partnership ("TruGreen") assert claims against four former TruGreen employees, Ryan Mantz, Lary Gaythwaite, James LeBlanc, and David Stephensen ("employee defendants"), along with their current employer, Mower Brothers, Inc., and two directors of Mower Brothers, Jean Babilis and Kevin Bitton. First, TruGreen alleges that the employee defendants have breached three provisions of the TruGreen employment agreements: a non-competition provision, a non-disclosure provision, and an employee non-solicitation provision. Second, TruGreen asserts that Mower Brothers, Bitton, Babilis, and some of the employee defendants tortiously interfered with TruGreen's economic and contractual

relationships Third, TruGreen alleges that Mower Brothers, Bitton, and Babilis violated Utah's Unfair Competition Act, Utah Code Ann § 13-5a-103 Defendants deny these claims in all respects

With regard to potential damages in this case, TruGreen asserts that an unjust enrichment or restitution measure of damages is appropriate for all of its claims The measure of damages under an unjust enrichment theory is generally the amount of defendant's profits Defendants argue that the appropriate measure of damages is lost profits, which is the amount of profit lost to the plaintiff because of the breach, interference, or unfair competition The Court has determined that there appears to be no controlling Utah law addressing these damages issues

Consequently, pursuant to Rule 41 of the Utah Rules of Appellate Procedure, the United States District Court for the District of Utah certifies to the Utah Supreme Court these questions of law, which are controlling in the above-captioned matter now pending before this Court

1 Whether under Utah law a former employer is entitled to an award of lost profits damages, or instead an award of restitution or unjust enrichment damages, where a former employee has breached contractual non-competition, non-disclosure, and employee non-solicitation provisions?

2 Whether Utah law recognizes an unjust enrichment measure of damages for tortious interference with a competitor's contractual and economic relations?

3. Whether "actual damages" under Utah Code Ann. § 13-5a-103(1)(b)(i), the Utah Unfair Competition Act, means the plaintiff's lost profits or an award of damages defined by the defendant's revenues?

To provide some context to the three certified questions, some brief discussion is in order. The parties disagree over the appropriate theory of damages to be applied in this case. TruGreen asserts that an unjust enrichment or restitution measure of damages is appropriate for all of its claims, while the Defendants argue that the appropriate measure of damages is lost profits. This Court will briefly address the parties' arguments as they relate to the various causes of action to clarify the scope of the three certified questions.

1. Breach of Contract Claims

TruGreen seeks restitutionary damages against the employee defendants for their alleged breach of the non-competition, non-disclosure, and employee non-solicitation provisions in the employee contracts. The Defendants contend that any possible damages are limited to TruGreen's own net lost profits proximately caused by specific breaches by each particular defendant. The Defendants point out that the majority of state courts that have addressed this issue appear to limit damages to the employer's lost profits or other consequential losses.[1] The

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[1] *See, e.g., Am. Air Filter Co. v. McNichol*, 527 F.2d 1297, 1300 (3d Cir. 1975) (limiting damages to lost profits when addressing a breach of a non-competition agreement); *The Toledo Group, Inc. v. Benton Indus., Inc.*, 623 N.E.2d 205, 211 (Ohio Ct. App. 1993) (applying a lost profits measure of damages to breach of non-disclosure agreement); *Nationscredit Corp. v. CSSI, The Support Group, Inc.*, 2001 Tex. App. LEXIS 1313 (Tex. App. Mar. 21, 2002) (noting that unjust enrichment is not a proper measure of damages for breach of a non-solicitation agreement).

Defendants assert that these courts have chosen to limit damages in this way by applying general contract principles recognized in Utah – such as the principle that a non-breaching party is entitled to recover its "expectation interest," which involves placing the non-breaching party in as good a position as if the contract were performed.[2] The Defendants also cite the Utah principle that "a party to a contract has a right of rescission and an action for restitution as an alternative to an action for damages where there has been a material breach of the contract by the other party."[3] Additionally, Defendants argue that the Utah Supreme Court uses the terms "restitution" and "unjust enrichment" interchangeably to describe the equitable remedy that involves restoring to a plaintiff the benefit it provided to a party that is not subject to an express contract.[4] A court's application of such principles to the contract claims in this case, in the view of the Defendants, strongly supports a lost profits theory of recovery.

TruGreen responds that it is not limited to recovering its lost profits but also any unjust enrichment by the Defendants. TruGreen first notes the difficulty of using a lost profits measure of damages in breach of non-competition, non-disclosure, and non-interference cases. In *System Concepts, Inc. v. Dixon*, the Utah Supreme Court held that injunctive relief may be an appropriate remedy for the breach of a non-competition agreement given that "the damages that may result from the misappropriation of confidential information and goodwill could be

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[2] *See, e.g., Robbins v. Finlay*, 645 P.2d 623 (Utah 1982).

[3] *Polyglycoat Corp. v. Holcomb*, 591 P.2d 449, 451 (Utah 1979).

[4] *See Am. Towers Owners Ass'n v. CCI Mech.*, 930 P.2d 1182, 1192-93 (Utah 1996).

estimated only by conjecture and not by any accurate standard.'"[5] TruGreen then notes that the Utah Supreme Court has generally acknowledged that an injured employer may also maintain a claim for damages in addition to seeking injunctive relief.[6] Furthermore, the Utah Supreme Court has shown a willingness to honor liquidated damage provisions in a non-competition agreement, provided the liquidated amount is reasonable, given that "[t]here is no doubt that the harm caused by the breach was one that was difficult to estimate with much accuracy."[7]

In addition to the difficulty of using a lost profits measure of damages for breach of non-competition cases, TruGreen also recounts the deterrent effect of applying an unjust enrichment theory of damages. In *National Merchandising Corp. v. Leyden*, the Massachusetts Supreme Court held that an employee who breached a non-competition agreement and the competitor who induced the breach were liable to account for their gains associated with the breach.[8] *Leyden* noted that "an intending tortfeasor should not be prompted to speculate that his profits might exceed the injured party's losses, thus encouraging commission of the tort."[9] According to TruGreen, the deterrent effect resulting from restitutionary damages, coupled with the difficulty of using a lost profits measure in breach of non-competition, non-disclosure, and non-

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[5] 669 P.2d 421, 428 (Utah 1983) (quoting *Columbia Coll. of Music & Sch. of Dramatic Art v. Thunberg*, 116 P. 280, 282 (Wash. 1911).

[6] *See Kasco Servs. Corp. v. Dixon*, 831 P.2d 86 (Utah 1992).

[7] *Robbins*, 45 P.2d at 626.

[8] 348 N.E.2d 771 (Mass. 1976).

[9] *Id.* at 775-76.

interferences cases, are more than sufficient grounds to support restitutionary damages for the contractual provisions at issue in this case

While both parties strongly argue their respective positions, they both concede that no Utah court has expressly determined the proper measure of damages for breach of these specific contract provisions Consequently, this Court respectfully asks the Utah Supreme Court to answer the first certified question

2 Tortious Interference with Economic and Contractual Relations

The second certified question is whether Utah recognizes an unjust enrichment measure of damages for tortious interference with a competitor's contractual and economic relations Both parties acknowledge that the Utah Court of Appeals has generally adopted Section 774A of the Restatement (Second) of Torts as the measure of damages for tortious interference with contract Section 774A provides that

> (1) One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for
> (a) the pecuniary loss of the benefits of the contract or the prospective relation
> (b) consequential losses for which the interference is a legal cause, and
> (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference [10]

Despite their respective reliance on Section 774A, the parties disagree regarding the effect of the Utah Court of Appeal's adoption of this section

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[10] Restatement (Second) of Torts § 774A (1979)

The Defendants argue that *Sampson v. Richins* is fully instructive on this issue.[11] In *Sampson*, the Utah Court of Appeals addressed cross-appeals on the amount of damages awarded to defendants for Sampson's intentional interference with defendants' economic relations.[12] *Sampson* upheld the trial court's damages award pursuant to Section 774A, noting that "one who is ultimately deemed liable to another for interference with economic relations is liable for 'the pecuniary loss of the benefits of the contract or the prospective relation; [or] consequential losses for which the interference is a legal cause . . . ."[13] Applying Section 774A, *Sampson* held that the trial court's findings regarding damages "must identify actual pecuniary losses suffered by [plaintiff] as a result of [defendant]'s conduct."[14] In addition to their reliance on *Sampson*, Defendants point to numerous courts outside of Utah that recognize that plaintiff's lost profits, and not restitution of defendant's revenues, are the proper measure of damages for tortious interference.[15]

Although TruGreen concedes that the Utah Court of Appeals has generally adopted Section 774A, it maintains that such an adoption nevertheless allows for the application of unjust

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[11] 770 P.2d 998 (Utah Ct. App. 1989).

[12] *Id.* at 999-1002.

[13] *Id.* at 1006-07 (quoting Restatement (Second) of Torts § 774A (1979)).

[14] *Id.*

[15] *See, e.g., Marcus, Stowell & Beye Gov't Secs., Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227, 231-32 (5th Cir. 1986) (holding under Texas law that damages for tortious interference are measured by plaintiff's lost profits).

enrichment damages in some tortious interference cases. First, TruGreen cites comment c of Section 774A, where the commentators note that "[a] major problem with damages of this sort is whether they can be proved with a reasonable degree of certainty."[16] Second, TruGreen argues that the fact Utah courts have adopted Section 774A merely supports the idea that the measure of damages in tortious interference cases must mirror the measure of damages for the underlying breach. In *Storage Technology Corp. v. Cisco Systems, Inc.*, the Eighth Circuit cited Section 774A but subsequently found that under Minnesota law, "[a]n employee who breaches a noncompetition or nondisclosure covenant can be required to account for his profits."[17] The court reasoned that "where the interference alleged is inducement of breach of restrictive covenants or fiduciary duties, the remedy should mirror the restitutionary remedy available for the breach of the covenant or fiduciary duty."[18] Also, as was discussed above, TruGreen contends that a lost profit measure of damages would encourage competitors and employees to speculate that their gains will outweigh losses and thereby encourage the breach of valid and enforceable covenants.[19]

As far as the Court and the parties can assess, no Utah court has directly addressed the measure of damages where former employees and a competitor tortiously interfere in the context

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[16] Restatement (Second) of Torts § 774A cmt. c (1979).

[17] 395 F.3d 921, 925 (8th Cir. 2005).

[18] *Id.*

[19] *See Nat'l Merch. Corp. v. Leyden*, 348 N.E.2d 771 (Mass. 1976).

of an employment contract containing non-competition, non-disclosure, and non-interference provisions. To determine whether Utah recognizes an unjust enrichment measure of damages for tortious interference with a competitor's contractual and economic relations, this Court respectfully requests the Utah Supreme Court to answer the second certified question.

3. Unfair Competition

TruGreen has asserted a claim under Utah's Unfair Competition Act, which limits recovery to "actual damages."[20] The parties differ over whether this phrases extends to lost profits or an award of damages defined by the defendant's revenues. It appears that no Utah court has interpreted the meaning of "actual damages" under this statute. Consequently, this Court respectfully aks that the Utah Supreme Court answer the third certified question.

CONCLUSION

The Court has concluded that there is no controlling case law addressing the three questions of law discussed above. Because these questions of law are controlling in this case, this Court certifies these questions to your Court. The clerk of this Court shall transmit a copy of this Order of Certification to counsel for all parties to the proceedings in this Court. The clerk shall also submit to the Utah Supreme Court a certified copy of this Order and any other portion of the record before this Court that may be required by the Utah Supreme Court. Under Rule 41(f) of the Utah Rules of Appellate Procedure, this Court orders that each party shall bear its own fees and costs of this certification.

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[20] Utah Code Ann. § 13-5a-103(1)(b)(i).

SO ORDERED.

DATED this 8th day of June, 2007.

BY THE COURT:

Honorable Paul G. Cassell
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 9th of November, 2007, a true and correct copy of the foregoing **Opening Brief of Petitioners** was served by the method indicated below, to the following:

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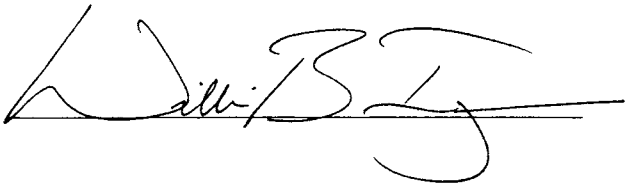
(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile



ADDENDUM NUMBER 2 TO OPENING BRIEF OF PETITIONERS

Motion Hearing Transcript, February 28, 2007
Before the Honorable Paul G. Cassell,
United States District Court,
in and for the District of Utah
1:06-cv-24 PGC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

In re:	)	
	)	
TRUGREEN COMPANIES, a Delaware Limited Liability Company,	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 1:06-CV-00024
	)	
KEVIN D. BITTON, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

BEFORE THE HONORABLE PAUL G. CASSELL

February 28, 2007

Motion Hearing

Laura W. Robinson, CSR, RPR, CP
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Salt Lake City, Utah, February 28, 2007

* * * * *

THE COURT: We're here this morning on the case of TruGreen versus Bitton, et al. Nice to see Mr. Johnson and his team again.

MR. JOHNSON: Thank you.

THE COURT: That is Mr. Ingram and Ms. Waite-Grover; is that right?

MR. JOHNSON: Yes.

THE COURT: All right. And let's see, Mr. Gibb and his team. Nice to see you again.

MR. GIBB: Good to see you, Your Honor.

THE COURT: We have got Mr. Olson, Mr. Hymas and Mr. Hull; is that right?

MR. GIBB: Yes, Your Honor.

THE COURT: All right. Well, we're here today, as I understand it, we had some earlier rulings and then the question is what is sort of the fall out from those earlier rulings particularly whether the fact that Mr. Elggren, the plaintiff's expert, has been excluded, whether that leaves us anything left to try.

I put together a tentative order thinking that, which outlines my tentative view on this. I will emphasize today that I am tentative on this. That with Elggren out, there isn't enough solid evidence about damages to move forward

and that we wouldn't -- nominal damages, I'm still working through the case law, but the law really would be somewhat mixed up if we could spend hundreds of thousands of dollars in attorney's fees to figure out who gets a dollar in damages. At least that is what I'm thinking now.

If I'm overlooking something, I'm sure that Mr. Johnson and his able team will let me know. So why don't I hear from you, Mr. Johnson, on all of these issues.

MR. JOHNSON: This may be a little bit like Sisyphus in the underworld. Having read your tentative ruling, Your Honor, I'm not sure, even though I think sometimes in a moment of arrogance I have some skill I'm going to have much success, but I will say a few things.

Historically, a breach of these kinds of covenants non-compete, non-solicitation, non-interference, non-disclosure of confidential information have been appropriate vehicles for injunctive relief. Why? For the very reason we have come, I think, to this juncture. The damages are, as the case law says and we cited ad nauseam, you have read them, they are notoriously difficult to prove.

It doesn't mean though that the injury to goodwill that is sustained by somebody who is subjected to a breach, the injury to fair competition that occurs when these kind of covenants are breached, the harm to a party caused by the exploitation of its investment in the training of an

individual is not real. It means that perhaps injunctive relief is more appropriate. Well we crossed that bridge back at the end of July when this court said well, preliminarily, so the court did change its mind. Preliminarily I suspect that you could show damages. Um, it seems just as an initial observation sort of unfair for the defendants to breach with impunity these agreements. And I guess I still remain reasonably persuaded, Your Honor, that any jury that looked at this evidence, particularly with respect to the five Idaho defendants, conclude they breached these agreements. Are able to do that with impunity when those agreements were bargained for at arms length. We seem to be now sort of lost perhaps, perhaps I'm the one that is lost, not the court, not Mr. Gibb and his team, in conflating the fact of damages with the amount of damages. It is going to be real hard for us to calculate with specificity an amount of damages. But I would suggest to you that a simple walk through of about three exhibits that are the defendants' exhibits are going to show you the fact of damages. That would be one that nobody is seriously going to contest, at least I'll be surprised if they do, that the named nine defendants that remain had no expertise in the lawn care sales industry until they went to work for TruGreen.

Number two, that there was no intervening employment

on those individuals' behalf when they left TruGreen and went to work for Scotts Mower Brothers.

Number three, that in 2005, TruGreen's performance was markedly better than it was in 2006, and that in 2006 Mower Brothers' performance was markedly better than it was in 2005. What was the causal link between that and the departure of the defendants? Well, I could bring in fancy charts, which I have but I won't, that show that those nine defendants', Exhibit 20 to Mr. Rasmussen's expert report, resulted in 95 percent of the revenue gain that was experienced by Mower Brothers Scotts.

Is any juror going to conclude, faced with that evidence, that well, that is just a statistical aberration? I don't think so. I don't think -- maybe we're in a situation where we have now in a context given every inference and their brief fact controversy we have given the nod to the defendants.

THE COURT: Why don't you just walk me through what you just did a little bit more, this notion that 95 percent of the revenue and so forth. I mean that sounds like the kind of thing that, you know, would support a --

MR. JOHNSON: For Mr. Rasmussen's and I apologize, I am sure that the defendants have these documents because they're attached as a report.

THE COURT: Have they had a chance to look at it?

MR. JOHNSON: This is their own documents.

THE COURT: They are squinting across the room here. Why don't you just show them what they are. I'm sure they can fish them out.

MR. JOHNSON: We can give them copies. I can give Your Honor a copy, too, if you would prefer. Heather, do you have an extra copy? Thank you.

THE CLERK: Do you want me to get the easel for that.

MR. JOHNSON: I'll just hold it. That is okay. In Salt Lake in 2006.

THE COURT: Let me make sure I'm on the same page you're on. Are you on Exhibit 20.1; is that right?

MR. JOHNSON: Right.

THE COURT: Okay.

MR. JOHNSON: Here are the figures that Mr. Rasmussen reports in his expert report. You see that the single largest producer of revenue in that office was James LeBlanc, $374,705. That is a former TruGreen employee. Most everybody else is no where near that amount.

THE COURT: Well, I'm -- so let's see, which employee is that, again?

MR. JOHNSON: Jim LeBlanc on the upper right hand side, Your Honor. One of the named defendants.

THE COURT: Is this -- maybe I'm on the wrong page here. I have got sales by program sold Boise.

MR. JOHNSON: Let me go to Boise first then, Your Honor. That is easy. Boise, for 2006 and Mower Brothers, the big producers were David Van Acker, 185,000; James Clogston, 194,000; Rick Deerfield, 120,000; and I'm not very good at math, that has got to be five or 600,000 out of 777. So my hyperbole got away from me. But they clearly produced the lion's share of revenue in Boise. I don't think there is a material dispute on that.

If we look at Ogden, again the lion's share of the revenue, or the biggest single producer at any rate is Mr. Stephensen produced $280,000 out of what is about 457,000, I believe. In Salt Lake, out of 370, excuse me, that is incorrect, out of about a million three, LeBlanc produced close to 400,000. And everybody else is in the much smaller range.

Now, Mr. Rasmussen's expert report attributes the growth that undeniably occurred in Scotts to what? To two things. Increased direct sales, and this is in his deposition, increased direct sales opportunities for those individuals. That just defies statistical probability that those guys could get that many more direct sales opportunities. I would submit that that is an inference that is going to be drawn in anybody's favor it ought to be drawn in ours.

Number two he says well, it is the nine employee

defendants that is betrayed by these very exhibits. And it is also betrayed by Mr. Mantz's e-mail when he says listen, our direct mail is down. The reason we're having a hell of a year, pardon my profanity, is what? Is because we have got these new sales people from Scotts. I mean from TruGreen. Is that enough? Well, I think it is enough to get it to a jury.

And I think, you know, the idea that well maybe there was a weather consideration, none of these things, of course, are advertising issues. None of those things are analyzed in any detail, if at all, by Mr. Rasmussen and certainly the people on the ground. That is like suggesting to say that Mr. Smith or Mr. Horlacher, or any one of the number of people from TruGreen, aren't competent to testify and haven't already in their depositions testified about this stuff or in their affidavits, is like saying that somebody has a better feel for what is going on in Iraq sitting in Washington D.C. than some general on the ground. They are going to know better than Mr. Rasmussen whether weather effects their performance or not. In fact, I think that was repudiated, if I'm not mistaken, by a number and I would have to go to a page, I'm out of order in my argument, Your Honor, but I'm reasonably sure that I can cite you to pages where they actually considered that and discounted that.

So, yeah, damages are very difficult to prove in these cases. And particularly in those non-painting a barn kind of contracts where you have interest like fair competition and injury of goodwill. But I don't think that the fact that we can't specify an amount at this kind of obvious evidence precludes us from going to trial on that issue. We're going to offer at trial, we would offer, Nick Smith, who has testified in his affidavit as to, you know, and maybe the court's concern is well is there a causation, is there -- yes, clearly these people are great sales people and they went over and this gets to the measure of damages, they went over and they generated similar revenue which we now clearly lost, you have seen the numbers, they're now generating that revenue for Mower Brothers not for TruGreen. But is that enough in the court's mind or does the court instead want to say listen unless we can show a real specific, that is, that they purloined customers from TruGreen to Mower Brothers, that is not enough. In fact, they may be gifted sales people.

Well, I would submit one that is a question for a jury. Two, I think it is betrayed by the evidence we have shown you. And three, I think although defendants consistently maintain well, while Utah doesn't allow a restitutionary measure, that is because Utah hasn't really considered it. And in fact in one case in Idaho, as I

recall, I believe that the Dunn versus Ward case in a non-competition agreement that did involve admittedly a sale of a business that they did use that measure of damages. Why? Because they are notoriously difficulty to measure. And we have a protectable interest in not only in our existing customers, but I think we have a protectable interest in the universe of customers that are in the geographic areas that we protected ourself. And I think that is borne out in case law which we have cited in our briefs.

THE COURT: So what is your damages measure? I mean I, you know, is it restitution? Is it lost profits? I mean what --

MR. JOHNSON: Well, it is lost profits. I guess we're limited to the 2,477 customers that defected, that even Rasmussen admits, from TruGreen -- from TruGreen to Mower Brothers. If it is what I think is much more appropriate a restitutionary measure, it is their gain. And I believe that cases that have -- jurisdictions that have considered the issue have concluded, and I'm going to quote from the American Express case, the loss of fair competition which results from breach of contract of a covenant not to compete is irreparable injury because damages are difficult to -- difficult to compute. In that case, they use the restitutionary measure precisely for that reason. What

would that be in this case? I think the gain to Mower Brothers which can be shown through their own documents and through their own expert, Mr. Rasmussen.

Frankly, I do not -- I guess the court on a separate note having not, you know, I understand the court's initial reaction to what nominal damages am I really vindicating any kind of right here if as the court has concluded these are really fact specific inquiries. You know, this is a fact specific inquiry. There is no over-arching declaratory relief I'm granting the plaintiff in this case because every one of these covenants not to compete enforceability turns on the individual defendant involved. I think that is the court's predisposition --

THE COURT: Geographic area --

MR. JOHNSON: Again, I understand that.

THE COURT: All of that.

MR. JOHNSON: I would say that with respect to at least the five Idaho defendants where I don't think there is any kind of issue that we have a -- we have an interest of enforcement as against them. If for no other reason that it is going to have a prophylactic or chilling effect on activity that otherwise is going to be really encouraged by the opinion in this case, you know, we're not going to -- we're not going to be able to look any employee in the eye and say these things are easily enforceable because we're

not going to get injunctive relief in this district court and it is difficult although perhaps a better lawyer could have more brilliantly proven damages, I'm suggesting that it is a very difficult task. And to get a judgment for nominal damages, if that, if the court is not persuaded to use these numbers and give us restitutionary relief, to give us declaratory essentially relief for nominal damages against those five and perhaps at least the other two which I think we could have gotten on summary judgment in Utah and go to trial on the remaining two in Utah, that is -- that is a tremendous value to TruGreen in dealing with a large work force.

And the flip of that is going to be, you know, we're in a situation where instead what is going to happen is I think people will now think they can breach these contracts with relative impunity and it certainly has a deterrent effect in so far as at least the five in Idaho and the four in Utah are concerned if not a more inchoate deterrent effect akin to the one that would result from enforcing capital punishment on a more regular basis. Pardon that metaphor, *Your Honor, but I think it is true.*

We would like that vindicated in this case. And I believe that the case law is relatively clear, particularly the Utah case of Internal Management which is pretty much on all fours with this case. It is a non-compete case where

there was an issue about causation and we couldn't, in that case, there was an inability to show diverted customers which is I think the lost profits theory the defendants rely on. The court none the less granted nominal damages in that case and vindicated that interest at least in so far as those defendants are concerned.

I am sympathetic to the idea that a lot of money gets spent litigating the case when there is no real damage. But in my defense, that is why I moved for injunctive relief in the first instance, Your Honor. And I think fairness may, under this circumstance, where it looks to me like every inference, every disputed fact has been resolved in favor of the defendants maybe we ought to look at it in another way. I don't think there is any difficulty at all. You know, I would love to be able to argue, I don't want to waste your time, the Wayne Elggren issue with you. Because I think that maybe we got the raw end of the deal, Your Honor, to be frank. But I don't want to consume needlessly this court's time because I'm --

THE COURT: I'll hear you on that briefly. I mean my --

MR. JOHNSON: Okay. Well, if I'm -- I would -- I will step down and just let Heather argue that, she knows it better than I do. But I do think that in spite of the fact that even without Wayne, I think that Heather will explain

the math better, but without Wayne, the amount of damages may be more difficult to prove. But the fact of damages is not difficult to prove certainly based on those exhibits and based on Mr. Rasmussen's own math which tracks Mr. Elggren's math. And what Mr. Smith and others from TruGreen will do is simply testify I'm on the ground with the guys in Iraq. I know that weather makes no difference. And the court says well why didn't you do this in your summary judgment papers? Well, primarily because we were interested in the result on liability, Your Honor. The evidence is in the record, and it is in the briefs. And with that, I'd like Heather to address the Wayne Elggren issue.

THE COURT: I'll be glad to hear from her in a second, but I have a couple more questions for you.

MR. JOHNSON: Fine.

THE COURT: One problem I'm having, I'm trying to get my hands around this, is I'm not completely clear on what your damages theory is. I think you have spelled it out a little bit. But once I get a handle on that, it might be helpful for me to see you layout, you know, the defendants are saying look you're telling us what you have got a foundation for, but you're not telling us specifically what the evidence is. And it might be helpful to say okay we're going to call Smith and he is going to say this and we are going to use this, defendants you know financial report Y

here and --

MR. JOHNSON: Okay. What I would say as to that, Your Honor, beyond that simple exercise that I just showed you, which I think is sufficient to get me to a jury, what I would do at trial is call Mitch Smith and Mr. Gershkoff to establish that the employed defendants were exposed to information while they conclude, and that is all they do is conclude, they don't deny they ever received it, they just conclude it was not confidential, that they were exposed essentially or attended the training that is identified in Exhibit K. That they were involved, that is Mr. Smith and Mr. Gershkoff as well as many of the management defendants that defected in the past and future performance analysis of TruGreen, that is the day-to-day revenue stuff that comes up with the flash reports, the cancellation numbers, the performance of each individual person. And that there is -- I would have in Horlacher's deposition already, I believe, but they would testify that there is a causal connection between their departure, that is the employee defendant's departure, the nine that remain, and the lost revenue to TruGreen. That is Exhibit 93 which these guys, if granted, have moved to strike.

THE COURT: Now let me -- this is where I am having trouble. How can they say that there is a causal relationship? The nine -- the employees that left, could

have left it is, you know, employment at will.

MR. JOHNSON: Sure. But had they left and not worked for them, we wouldn't be here. They went to work for a competitor in contravention of their agreement.

THE COURT: But the point is that what I would have to hear from is the fact that they went to work for a competitor now created the loss, right? Just the fact that somebody leaves does not create damages you can recover for. What you have got to show is one more bit of information. They went over to --

MR. JOHNSON: I guess I would disagree with the court on that. I understand that is the real technical lost profit theory. But if there is all these other inchoate interests that we can protect which cases that have dealt with these things identify, that is the loss of goodwill which is what is measured by gross revenue. The loss of the protection for a fair competition which we have bargained for in these agreements. I don't think we have to show anything other than their services now. I mean I grant you there is a 13th Amendment that prohibits involuntary servitude, but they have taken those skilled in that expertise and gone somewhere else. And that has damaged us. That has damaged us. And anybody that looks at the revenue they produced for our competitor and understands that they honored their employment agreements, they would either not

be working for -- they certainly would not working for the competitor and they might be working for us, understands that that revenue at least is more assessable to us because it is not of the defendants and in some cases would be ours if they had honored their agreement and stayed in our employ. I understand the difficulty that the court has with this, but that -- that is why these things -- let me just step off comparing parenthetically. I would have been more comfortable, and I have to be careful because I don't want to sound like a complainer or a whiner, if early on in this case we would have said, you know, counsel, I just have problems with the public policy underlying these agreements. I am not sure they're enforceable because they tend to retard or restrain competition, but that is really not the road that we embarked on. And, you know, mia culpa, mia culpa, mea maxima culpa. I made some errors in this case I'm sure.

THE COURT: I may have led you down the wrong path because when I ruled on the injunctive relief I thought you all were going to prevail when we got later on.

MR. JOHNSON: I don't think we have fallen down on the liability issue much. At best we're going to trial. I do think on a number of these defendants maybe that was just an abundance of caution on the court's part. I don't think we should be hamstrung because all that we can show, and I used

all in quotes, is that people that worked for us are now the humongous producers for the defendant and the defendant's own witnesses, their own expert and their own sales manager, at least the testimony of their sales manager Ryan Mantz said the reason we're doing so well is because these people have come over. The court's question seems to be well how do you tie that to their departure from you? And what I have said to you is we have a lot of more, like I say, inchoate interests that we can protect that those cases identify. And goodwill which translates into lost revenues is one of those. That is why a restitutionary measure in these cases, I think, is more appropriate.

THE COURT: If they had gone to Hawaii, which is let's stipulate not a competitor with your clients here in Utah, the fact that they left wouldn't entitle you to anything?

MR. JOHNSON: No, you're right. But I also would not have a chart that showed them generating that kind of revenue from my competitor. That revenue would still be in play, Your Honor.

THE COURT: Suppose they had gone to Hawaii and, you know, Stephensen generated $280,000 in profits for the Hawaiian Lawn Mower Company.

MR. JOHNSON: They are not in the universe of customers that I'm entitled to protect geographically.

THE COURT: Now what I think that maybe my

hypothetical is getting at, they're not in Hawaii, they're closer by, but you have got to show that it is not like Hawaii. That they're actually, you know, stealing people away and dollars away from your -- from your company.

MR. JOHNSON: Well, I think, as I said, I think the conclusion is, in some respects, is inescapable. When you see that on day one in 2005 being day one, we have a very good year, these people work for us and we have a lot of revenue. On day two, this is 2006, they don't work for us. We don't have the same revenue and suddenly Mower Brothers has the revenue. Not only that, the revenue is attributable to those people who used to work for us. And not only that, their own sales manager says the reason we're doing so well is these people work for us. Not only that, the owner of the business says the reason we hired these people, is why? Because we needed their marketing expertise.

Not only that, we know that the only marketing expertise they ever got was when they went to work for us because they had none beforehand. That is unambiguously agreed in everybody's deposition, and it is also unambiguously agreed that nobody worked any place else after they left us and went to work for them. I think that is enough. If I'm on a jury, I'm buying that unless the judge says I'm not going to let you get it, which is essentially what has happened here.

THE COURT: Let me ask you another question about Smith. I have just had a quick chance to go over this morning your motion on, you know, the Exhibit 93. And you're planning to call Smith. But it seemed to me you're planning to call Smith as an expert witness. My question is, was he disclosed as an expert witness and, you know, that is why we have reports and the whole sort of expert witness apparatus.

MR. JOHNSON: He was disclosed as an expert witness and to be fair to the defendants, if I'm not mistaken, Mark, you have moved to similarly to Mr. Elggren to strike him as an expert, didn't you?

MR. GIBB: That is correct.

MR. JOHNSON: I don't know that it has ever been disposed of by this court.

THE COURT: So I mean one --

MR. JOHNSON: He was identified as an expert and summary of what he intended to testify was provided.

THE COURT: Was the summary the same thing that I am seeing here?

MR. JOHNSON: No, not at all. His testimony was to be about acquisitions, I believe. I would have to go get -- I hate not to be so conversant with every fact in this case, Your Honor, but I'm pretty sure that his testimony was to be limited until we decided to try to use him under 701 to

acquisition prices.

THE COURT: But the -- it seemed to me your pleading that just came in this morning is going to try to use him as a 702 expert witnesses on damage calculations and that that would not be permissible based on what I know about the case because there is no report and no depositions.

MR. JOHNSON: I would stipulate that if he is being treated as an expert under 702, that is a right read and that is something that if we're going to talk about, if I might defer to Mr. Ingram because he handled that part of this case.

THE COURT: Maybe I should hear first from Ms. Waite-Grover on the Elggren issue and then Mr. Ingram on the Smith issue.

MR. JOHNSON: That would be helpful.

MS. WAITE-GROVER: Your Honor, TruGreen argued in its motion to reconsider, we believe that the court has erred in both of its reasons for excluding Mr. Elggren's testimony.

The first reason as we understand it from the court's order for excluding Mr. Elggren's testimony as unreliable was that the idea that his methodology assumed -- methodology assumed the conclusion. And in so saying the court pointed out its contention that TruGreen had not explained how Scott's gains are a result of TruGreen's employees' actions or breaches. And that also Mr. Elggren's

methodology assumes the conclusion.

We would like to first point out that the issue of causation is a separate issue. And that Mr. Elggren, as our damage expert, assumed causation. We believe that the case law entitles him to do so. While it may be advantageous to a party to have their damage experts speak both to causation as well to the damages, the fact of damage and the amount of damage Mr. Elggren is nonetheless entitled to limit his testimony simply to an analysis of the numbers which is the amount of damages.

Doing so does not make it fatal to the reliability. The fact that he assumed causation simply means that at trial, in the event that it is not ultimately proved, this court would have less weight or less credibility with the jury. Thus --

THE COURT: Well, what do you assume though? I think -- I think in theory that is correct, but I'm wondering how that works in practice. It is sort of like saying well, okay, I'm going to assume causation. I'm going to assume that 30 percent of the revenues, you know, that Scotts got was stolen away and now let me do the math ah-ha 30 percent is, you know, $3 million or something. I mean isn't the key question in this case has always been what percent of the revenues were stolen away from Scott and handed over to TruGreen. And that is what I thought Elggren was trying to

get at.

MS. WAITE-GROVER: And he was doing that. He came up with a figure of 30 percent of retention that he believes was attributable to the methods adopted by Scotts after the arrival of the TruGreen employees. Specifically, one of those methods was -- was to cancel the call-in practice that Scotts adopted prior to the TruGreen employees coming over. Essentially a practice whereby the Scotts' employees would call the customer prior to actually performing the service. If you would like me to walk through the math on that, I have prepared a chart that I think is a little bit more simply explains it.

THE COURT: I'll be glad to look at that.

MS. WAITE-GROVER: First, I will point out that there was two pieces of evidence in the record that Mr. Elggren used to come up with the 30 percent figure. Number one, was financial data submitted by Scotts; and then the second was an analysis of the trends at Scotts as evidenced by Mr. Mantz's March 2006 e-mail. And those are the two documents from which Mr. Elggren formed a basis for his 30 percent figure.

He noted based on Ronny Mantz's e-mail, that Scott's had had a past record of having 50 percent of their customers at risk at every phone call. Meaning every time they called a customer before performing a service, they had

a chance that half of the customers were going to say no thanks, I'm done. He noticed that Mr. Mantz also pointed out in these e-mails that in 2005, 53 percent of the customers at Scotts were signed up on this call ahead program.

So if you look at rows A, B and C of the chart that I just handed you, that shows that of the 53 percent of Scotts' customers that were signed up for the program, half of those were at risk of cancellation every time a phone call was made. Which means an overall 27 percent of the customers at Scotts were cancelling based on this call ahead program.

Then if you look at row D, E and F, you will look at the numbers for 2006. As reported in Ryan Mantz's e-mail, in 2006, they had managed to change it so that only eight percent of their customers were signed up at the call ahead program. So if that 50 percent risk factor is still there, that means that of those eight percent signed up on the program, only four percent would ultimately cancel.

So if you look at Row G, and you are comparing the cancellation rate from 2005 and 2006 associated with this call ahead practice, you come out with a net savings of 23 percent of your customers. Whereas in 2005, 27 percent cancelled. In 2006, only four percent cancelled. That drops the cancellation rate 23 percent.

Then Mr. Elggren went and looked at Scotts' financial records that have been produced for 2005 and he found out that the total revenue that Scotts earned in 2005 was a little over two million dollars. 23 percent of that $2,000,000 is that $489,000 figure that you see in Row I. When Mr. Elggren went and looked at the 2006 revenue from Scotts' financial data, he determined that the revenue attributable to customers carried over from 2005 was $1.6 million. And then he compared the amount of that revenue on line I with line J. He basically divided the customer revenue that was saved by dropping the call ahead procedures, the $489,000 figure, by the overall 2006 revenue from the 2005 customers and he found out that 489,000 is 30 percent of 1.6 million.

So this is how Mr. Elggren came to determine that at least one practice adopted by Scotts after the arrival of TruGreen people, and I believe at the behest of Mr. Mantz, saved the company approximately 30 percent of its revenue from pre-existing customers, customers that existed in 2005.

THE COURT: You started out by telling me that he was entitled to assume causation. So I guess I don't have a problem with him saying look, I'm going to assume that 30 percent of this was stolen away from Scotts and if you do the math it turns out to be $500,000 or whatever. But your side of the case still has to put into evidence somewhere

something saying and that 30 percent is reliable Daubert satisfying statistically valid conclusion. And if Elggren isn't going to do it, who is going to do that for me?

MS. WAITE-GROVER: The math that I just went through right here is Mr. Elggren's method for arriving at the 30 percent figure and for concluding that 30 percent is a legitimate number. I don't think that there is anything radical about the addition, subtraction and multiplication that I just walked you through there that Mr. Elggren used. I mean that is his accounting method for assessing 30 percent. And I guess I fail to see how that is unreliable or some sort of radical or new or untested method for doing math.

THE COURT: Well, the math is all right, but why 30 percent? I mean you could plug in 40 percent and you could get more money or the defense could say, well, make it 20 percent. Who is going to say 30 percent is the right, you know, that this is all safe because of the new Mantz procedures. Is Elggren going to say this 30 percent all stems from the new Mantz procedures and therefore that is the causation link?

Maybe my question is not very clear. I'm sorry. Because you started off by -- let me run at that this way again. You started off by telling me he is just the math guy, he is just calculating damages, he is entitled to

assume causation. I agree with you. But then if he is assuming causation, what -- which witness at the trial for TruGreen is going to say let me show you now the causation here is going to be a 30 percent loss in revenue.

MS. WAITE-GROVER: I think that the causation is not about the 30 percent number. The causation is about what they used to -- what they used to improve that. I mean the 30 percent is the end. The causation is the middle. Mr. -- the causation has to do with Ryan Mantz coming over and telling Scotts no, no, no, no we can't do call ahead any more because call ahead puts 50 percent of our customers at risk at every phone call, let's reduce the number of customers on our call ahead program. That is the causation. Ryan Mantz saying I have been over here at TruGreen and we dropped our call-ahead years ago because we found out it was just too risky, we lost too many customers every time we made a phone call. And he goes over to Scotts and says this is a marketing technique, a sales technique that is going to improve performance at our company. That is the causation. Mr. Elggren noticed that and we pointed that out to Mr. Elggren in the Ryan Mantz e-mail where he described what they were doing. That they had a specific plan to reduce the number of customers that were involved in this call-ahead program. And once that was done, Mr. Mantz reported how many people used to be on the call-ahead

program and how many people are now. Mr. Elggren then went and looked at that e-mail and said 53 percent used to be on the program and now only eight percent are, that means that there is a net savings of 30 percent. Does that make sense to you? The causation is about what Mr. Mantz did. And the calculation is about what Mr. Elggren did to link those two figures.

THE COURT: All right. I think I understand the position now.

MS. WAITE-GROVER: Okay.

As we have gone -- based on your previous order, the biggest thing pointed out by you is somehow the speculation was this 30 percent figure. And it was characterized as a guesstimate. And I think that what we have just gone through right here with the math shows that the 30 percent figure wasn't just pulled out of thin air, it was pulled out of the memo by Ryan Mantz as well as Scott's financial figures and it was done according to pretty simple accounting methods of addition, subtraction and multiplication.

Furthermore, Mr. Elggren explained some of this in his deposition where plaintiffs are -- or defendants had the opportunity to ask some questions about this and to understand this figure. So although -- so unless there is some other degree of speculation by the court, the

30 percent figure having substantial basis cannot justify the court's decision to exclude his report as somehow unreliable. I'll point out that some of the other assumptions that were criticized made by -- supposedly made by Mr. Elggren that were also criticized by Mr. Rasmussen, the defendants' expert, are really not matters -- really not issues. First of all, several of them are matters of law.

THE COURT: Before you get into the details, you may have a good argument. Part of the problem though is the way this was presented to me that, you know, the defense said hey, here are a whole bunch of factors you haven't taken into account and then your response brief said well kind of we have done the best we can and it really didn't deal with the specifics that they came up with. I mean am I -- was I wrong? To some extent I was holding you to the procedural defect and the way you presented your argument. Was I unfair in doing that?

MS. WAITE-GROVER: I believe so. And if you look at the Ninth Circuit case that we cited in our reply brief, which I also have a copy of and can give to you and the defendants, the court considered precisely the issue before this court and that was that there was a damage expert who had been called on to testify as to the amount of damage incurred by a company as false advertising against another company.

The damage expert, like the expert in this case, calculated damages based on the defendants' gain flowing from the bad act, the false advertisement in that case. And then the defendants argued that this expert's report was unreliable because it failed to take into account certain confounding causes. Those confounding causes, if you look on Page 143 of this case, are virtually identical to ours. These causes were things such as the weather, they point to the drought that was going on in California, economic recessions that may have been going on in the state, marketing changes, changes in the market for the particular type of trees and lawn care products sold by the companies, other lawful competitive efforts of the defendants and just comparison of the two products offered by the company.

The court looked at this and he said these asserted defects in the expert's testimony go to the weight of the evidence and not the admissibility of the expert's report. We argued to the court that this case is essentially identical.

THE COURT: Here is the difference I see. Mr. Gibb and his team said here are all of these false confounding variables and these variables go not to the weight to be given to the testimony, but to its very admissibility. And then in your response brief you essentially punted that issue and didn't come back. I mean, I think if you had come

back and said well, you know, here are some others, we think we do have some responses to that it would be one thing. But procedurally, you didn't do that in your opposition to their -- to their motion at least the way I was understanding the pleadings that were coming in.

MS. WAITE-GROVER: Well, yes, there are two things that I can say to that. First, although it may not have been specifically addressed in the pleadings, at the oral argument motion for summary judgment, I believe Mr. Johnson made clear we were disputing some of those facts.

THE COURT: We typically don't let folks, especially in a case like this where we have piles of papers on both sides and say well, you know, my rhetorical flourish at the oral argument is sufficient to contravene disputed fact number 23(a)(2) or something. I mean --

MS. WAITE-GROVER: Let me first point out one, we think that on a motion to strike it is inappropriate to deem as undisputed facts that aren't specifically controverted. There are only two rules of civil procedure that allow a court to do that and the first is Rule 8(d) which addresses pleadings, complaints, counter-claims, cross-claims and so forth. And then the second, the one cited by the court, is Rule 56 which is about motion for summary judgment.

The motion to strike is not a pleading and it is not a motion for summary judgment and therefore we believe that

the court and the defendants in asserting so lack a legal basis for deeming those as undisputed. Secondly, even if for some reason they are relevant factors that must be taken into account, I believe that it is Ninth Circuit case that clearly says that it goes to the weight and the credibility of the expert's testimony. If you fail to take those into account and at trial the plaintiffs are not able to rule out all of those confounding or intervening causes, it just makes its numbers look less credible because he didn't take those things into account. It doesn't destroy the admissibility of the report in and of itself because it doesn't render it less reliable.

THE COURT: All right. I think I understand the position on that. Is there anything else critical that you wanted to tell me before I get to Mr. Ingram?

MS. WAITE-GROVER: No. I think we were just going to point out just as a final detail that some of the other alleged defects as indicated by Mr. Rasmussen are actually things such as legal conclusions.

One criticism he makes of Mr. Elggren is that he assumes the damages to TruGreen are best measured by revenue gains. That is a legal question that was never addressed and that has yet to be officially determined by the court. And other things are simply non-issues. Mr. Elggren assumed that Mr. Mitch Smith is an expert in lawn care acquisition.

He had been designated as such and until now, even I guess at this point, we haven't officially ruled if he is going to be stricken as such. So many of the things that Mr. Dirk Rasmussen points out about the report are not actually factual disputes or things that relate to reliability, but just matters before the court that will ultimately be fleshed out in that sense.

With regards to that, I believe that is all that we have to say on that and we urge the court to reconsider excluding Mr. Elggren's motion.

THE COURT: All right. Thank you, Ms. Waite-Grover. I'm glad to hear from Mr. Ingram now on where we end up on Mr. Smith.

MR. INGRAM: I guess first, Your Honor, I think it is important to clarify the scope of Mr. Smith's Rule 72 designation as an expert witness. It is a limited scope. The only scope of that is how is goodwill recognized in the lawn care industry. To get to that, you have to go back to the contracts which on both the old versions and the new versions identify goodwill as something that is going to be irrevocably harmed or damage in the contracts. You look at Scotts which have the same mirror almost verbatim the same language in there. In fact, the Scotts agreement has the same restitutionary measure as the old TruGreen agreement and that is any breach of any of these companies entitles

the employer to the revenues gained by virtue of such a breach.

So the question then becomes well, what is goodwill? What is this intangible to the contracts we're talking about. So the question becomes then well, it is in both the TruGreen agreement, some of Scotts agreement. What is the industry recognition of law of goodwill? Mr. Smith's expert testimony is based upon 21 years experience in the lawn care business, over 45 acquisitions. And the question is how do you measure goodwill in the acquisition of these businesses? And the response, goodwill is essentially the existing customer revenue base of that company, a dollar for dollar measure of revenues essentially, times a negotiated multiplier or multipliers that have been done, customer base, geography, et cetera, et cetera.

That is the scope of his expert opinion. It is essentially to say that the damage to goodwill is the customer revenue generated by these new employees when they went over to Scotts. In other words, the goodwill that TruGreen lost should be measured by the customer revenue and Dirk Rasmussen's report that shows how much money they generated on behalf of Scotts. The rest of Mr. Smith's testimony is left to just 701 lay opinion testimony which is as region manager of the northwest region market on a weekly basis he receives flash reports, he receives e-mail

summaries and these flash reports it shows how many sales representatives they have, the revenue that those sales representatives generated for the week, and the -- or the -- and then whether or not they're up to budget. And from that testimony it is in the record again, that summary judgment record where we testified that based upon his analysis of those documents, put him and his branch managers to prepare the same documents that are saying theirs is going to be a significant down turn in TruGreen's performance in 2006. There is a budgeting process that happens at the end of 2005. Who is involved in that budgeting process? Ryan Mantz. It is Larry Gaythwaite, Jason Hiller. And what is the standard in that budgeting process? They're held to -- they're told to hey just pull a budget figure out of the air? No. They're expected to provide TruGreen with a realistic budgeted figure on what they expect to produce and in the deposition of Cory Horlacher which we provided to them on damages, he testifies that that budgeting is done in large and significant part to our veteran sales representatives and the revenues that they have produced in the past and we expect them to produce in 2006.

THE COURT: I mean I think he can testify that our revenue is going down or isn't going up as fast as we thought it was going to be. But the -- but to help your case at this juncture, at least as I'm understanding the

facts, he has got to, as a lay witness, say and the causal factor for that is those competitors over there at Scotts. And that is where I am thinking that is outside of the realm of 701 lay witness testimony.

MR. INGRAM: Well, I guess that is where we're kind of -- where something has been conflated I think in the defendant's argument. There are two different distinctions. One is there is a fact of damages and two there is a measurement of damages. And it seems to me we are having a situation where because you can't provide me a specific measure of damages, you can't show the fact of the damages.

And what Mr. Smith and what his people can say is they can prove the fact of damages. And that is in 2005 we met our budget. In 2006 we didn't. In 2006 the reason we didn't meet our budget is because I lost my veteran sales representatives who were producing -- who were my high producers in 2005. I lost my managers who were training those guys. And instead of selling in 2006, I had to train my managers to replace these guys. I had to reshuffle the board to make sure I was covered in Ogden for this depletion. I had to do all these things. I think the very least that establishes the fact of damages. And case law said, and I think we said this in summary judgment, once you establish the fact of damages, the measure of damages, the burden then isn't as great as showing the fact of damages.

The case law says defendants have to bear some weight in inaccuracy or something to do with the measurement of damages because after all, why are we even dealing with this hypothetical because of the wrong of the defendants, the breaches of contract, the departure of the employees. And I think one thing the court is struggling with again is just, you know, what is the causation? Well, we have talked about TruGreen's loss in profits. Maybe we can't at this point give the specific measure. I don't think it can ever be given a specific measure again, that is why I went for preliminary injunctive relief. Lost profits is one thing but why the defendants gain? Why restitutionary measure? Well, it goes back to what some of the losses are. There is discussion well these guys could have gone to Hawaii. How can you say you had an expectation that you would produce this in 2006 had they gone there? That is one point. But the other point in general, too, is look at the competitive market here. Scotts was a new franchisee, couple of years old, 2005 down in sales, they're operating at a loss, they're operating in the red. In one month, they're able to completely skip the learning curve, provide premium guys with a ready made management and sales force to turn around their business and start making sales. Where did they get this learning curve? Was is it from Scotts? Was it some process already in place? No, it was from these employees.

It was from TruGreen. It was from the benefit was from Ryan Mantz's 13 years of experience at TruGreen that cost TruGreen money, that cost TruGreen experience here in the Utah marketplace not in Hawaii. Scotts is able to within months start cranking out numbers showing who is the top performers in Salt Lake in Idaho, surprise surprise it is Stephensen, LeBlanc, Van Acker. These are attached as exhibits to TruGreen's summary judgment motion.

Causation. Again we look at Exhibit J to TruGreen's summary judgment motion. Ryan Mantz, the new corporate development and expansion director subject less direct mail more sales. An exhaustive analysis that has never been rebutted by defendants, that has never been said is somehow inaccurate, but that is March 6th what is he attributing the success to? He is not attributing it to the weather. He is not attributing it to the processes already in place. He is saying hey, we did good last year, we're doing good this year, no immense improvements over last year. Our sales team has improved immensely over last year. Let's look at the other exhibits. Who is this sales team? Well, the top five performers are all former TruGreen employers. Take time to pat our sales managers on the back. They're really saving our bacon by teaching these guys how to maximize and relief who are these sales managers. It is Matt Walker. It is Larry Gaythwaite. It is Jason Hiller. It is Ryan Mantz.

Former TruGreen employees. Thank our rep and sales managers for not turning in a $228,000 year to date based upon 2005 deficiencies, and instead getting us to the 900,000 mark through February. If this is not causation or the fact of damages, Your Honor, I'm not really sure what it is.

THE COURT: All right. Let's assume you have convinced me on that, so there is damage. But then now we know that damages have to be proven with some, you know, what is the phrase, reasonable certainty or something like that.

MR. INGRAM: Well I think first it is a more strict burden to show whether you have been damaged in fact and the burden is somewhat, I think, in this case you may be even more diminished when you're going into measurement of damages and that is in the TruGreen summary judgment motion and the -- again --

THE COURT: But the damage could be a dollar or it could be you all are asking for $2.7 million. I mean, you know, assume you got a jury verdict for $2.7 million. Would that just be speculation? I mean --

MR. INGRAM: Well, I'm --

THE COURT: What would be the specific, you know, what would be the specific underpinnings for some verdict like that?

MR. INGRAM: Well, the specific underpinnings, I

think, are the numbers that have been generated through here. We can show how much Mr. LeBlanc sold for Scotts' in 2006. We can show how much these other defendants sold in 2006. We can show how these branches performed in 2006 based upon the numbers. And I guess the issue is well these intervening causes go to the amount and should effect -- should effect the amount or what not. But, again, Your Honor, why are we analyzing these intervening factors? Is it because TruGreen hasn't been damaged? No. We're analyzing these factors because they have created the wrong. There has been an increase in revenue and the case law says that they have to bear some of the burden for that. They have to bear some of the burden to say no, this is not why we increased. And where in Dirk Rasmussen's report is it saying -- is it attributed to other factors. Well --

THE COURT: Is it all coming down to the issue, talk me through here, I think some things are crystallizing. Is it all coming down to a restitution notion? That a dollar that they get ought to come back to you. Is that -- is that --

MR. INGRAM: Yes.

THE COURT: So --

MR. INGRAM: And I think defendants should bear some burden in that. That if there is some inaccuracies associated with that, they need to bear some burden in

showing why there is an actual inaccuracy there because they have created the problem. They have -- they have brought the guys over who generated the revenue for this. They have created the problem and I think that Mr. Rasmussen has got to have a similar burden than just saying well, he hasn't considered the weather, he hasn't considered new products, he hasn't considered this. He can go on and on and on about these factors. But curiously omitted from this report is any quantification of that. It is simply, well, they put out more direct mailers in 2006 and that is why they sold more. The e-mail of their own witness rebuts that. Less direct mail, more sales. And I guess if -- I guess we're coming back here we need to keep these things separate, the fact of damage and the measurement of damages.

THE COURT: Right.

MR. INGRAM: And the measurement we have got are the revenues that these guys generated. Those are hard dollar figures. If they're going to show some inaccuracy there, I think they need to bear some of that burden. Um, some of these intervening factors from the deposition of Mr. Rasmussen is identified they couldn't have been accounted for because more didn't have the daily access to them in their records. And maybe Mr. Johnson can clarify that a little bit more but --

THE COURT: I mean the reason -- let's go back to the

restitution point. Now sitting here right this second, it seems to me that if I ruled that yeah restitution is the proper measure of damages here, and then as you suggested there is circumstantial evidence from which a jury could conclude that you all have been damaged, and now, well, okay well what would be one measure of restitution? Well, Stephensen made $280,000 in sales for them and that should have been for you all. But I'm wondering whether I should get -- I hate to suggest more briefing here, but what we really need then is briefing on whether restitution is the right measure of damages because I'm not sure or is that stipulated?

MR. INGRAM: That is briefed. That is basically the essence of our damages. Because it is supported by the contracts which say, at least in the old agreements and new agreements which say the revenue increase, i.e. restitution that they -- the unfair competitive gain. Again, this is all about unfair competition, the unfair competitive gain. The ability of Scotts to skip that learning curve that cost TruGreen money and years of experience. And how do you measure that?

And again, coming back down to the measurement, I think it is something different from the -- from the fact again because frankly the guys like Ryan Mantz they're not -- they're not out there hitting the pavement like these

guys, I guess, and making the sales. They are not attributing a dollar figure to these guys. Does that mean that there is no harm? Does that mean that he hasn't harmed TruGreen somehow by showing Scotts the methods or his new management technique? No, of course there is harm there. But how do you measure that? And the case law says, well, the defendants have got to bear some of the burden of that. Again, the hypothetical is only made a hypothetical by the very wrong of the defendant. Ryan Mantz again, you know, thank our reps and sales manager. I'm sorry I sound like a broken record here, Your Honor, but I guess --

THE COURT: No, I think I'm getting a feel for your position now so I appreciate that. Is there anything critical? I should hear from the other side here at some point.

MR. INGRAM: No.

MR. JOHNSON: If you want that brief, Your Honor, we'll be happy to do it.

THE COURT: Right. Mr. Johnson says he is happy to do it, Mr. Ingram.

MR. INGRAM: I guess so.

MR. JOHNSON: I'm --

THE COURT: Is it unanimous?

MR. INGRAM: I'll be happy to spend some time on that, Your Honor.

THE COURT: It was briefed. I guess I was hoping to kind of take a short cut. And as you know, my tentative opinion said well, we'll duck that issue. And maybe as I think through it with you I want to hear from the other side on this, maybe that is the critical issue here because restitution is the right measure, it would be my tentative thought is you do have some evidence of things that could be restitution.

MR. INGRAM: Again, I guess I think why it wouldn't be beneficial again remember one of the problems of having to deal with here from the beginning the losses that we have heard from the defendants is well, this loss of customers and it is even reflected again in Dirk Rasmussen's report. I have seen no causation because I haven't seen the shift in customers.

Well, again, what are the critical issues here? Is it the customers or is it the training? Is it the know how? Is it, again, the ability to skip the learning curve. And I think, again at this point, dismissing -- conflating measurement of damages or putting together a measurement of damages and the fact of damages together and then drawing an inference in favor of Scotts on their motion I guess just seemed to me not a firm enough basis to grant summary judgment. It seems to me if we can show causation, maybe not prove causation or at least draw a reasonable inference

of causation through the numbers, their e-mails, they are all part of the summary judgment record, and it is simply an issue of measurement which we're saying we have got numbers, we can figure this out somehow. Something that should go to trial.

THE COURT: All right. Thank you, Mr. Ingram.

Mr. Gibb, I'm glad to hear from you all on all of these subjects. Let me just give you a heads up. The thing that I'm thinking where the plaintiffs have made some headway on is the theory that damages could be done on a restitution basis and we have got evidence in the record of sales and so forth that support restitution as a measure of damages. So I'm glad to hear -- I don't know how you want to structure your presentation, but that is one point I'm hoping that you'll touch on.

MR. GIBB: I'll be happy to, Your Honor. Mr. Olson and I are going to divide the time and I think it may be appropriate to simply address the exhibits that have been proffered to the court and to alert the court as to how they're being misconstrued. In the first instance though I must say that the preliminary injunction of the plaintiffs did not say that they did not suffer any damages. Indeed they submitted a report and a letter from Mr. Elggren regarding their damages that he has since abandoned in his expert report. So this has been firmly in front of the

court from day one and the plaintiffs have been pleading it from day one but have failed to do so with the specificity necessary here.

They have now lost their expert, according to the court's prior ruling, because he failed to do what? He failed to show that our profit was their lost goodwill which is the restitutionary basis that the court is considering at this point.

This is another iteration of Mr. Elggren's improper reasoning and calculation in his expert report. They have just renamed it as a legal theory at this point in time. The court will need to consider several things with regard to Exhibit 20 that they have prorfered to the court.

THE COURT: That is these blow ups here?

MR. GIBB: That is these blow ups and the ones that you were given. It is discussed in Mr. Rasmussen's report at paragraphs 195 and 196, and I'll try to read not quickly for your reporter here, it says, "Mr. Elggren failed to appropriately consider that a certain amount of Mower Brothers revenues during the damage period are and were attributed to the Mower Brothers employees who have never been affiliated with TruGreen. Furthermore, there are a certain amount of Mower Brothers revenues that are not associated with any particular employee but rather are ascribed to advertising sources. From the Mower Brothers

data base, I was able to find the revenue generated by both the defendants and by employees who worked at Mower Brothers but were not previously affiliated with TruGreen. The break down of these amounts could be seen in Exhibit 20 which is before the court. Based on this analysis, I found that 65 percent of the total revenue was generated by employees who have never been affiliated with TruGreen. As shown in Exhibit 20, if Mr. Elggren had analyzed Mower Brothers data base, which was available to him, he would have found that contrary to some of the underlying assumptions in his economic damage calculations, the revenue increases were not primarily attributed to the defendant employees, but rather to non-defendant employees."

That is how Mr. Rasmussen created Exhibit 20 and that is what he went back and used it for. You have to take Mr. Rasmussen at his word that he has done precisely the thing that Mr. Ingram just argued. We have gone out and taken their restitutionary theory, that Mr. Elggren proffered, and come up with the other factors and shown the court that even under that theory, and even under that theory as calculated by lost profits because you have to calculate it by reducing revenues with costs and other things, that all of these other factors do not point to damages being suffered by these plaintiffs. Indeed, given all of the factors that the court has previously ruled were

relevant, he has shown in his report, and the plaintiffs have not rebutted it, that all of those factors dictate dismissal as the court's preliminary ruling suggests.

THE COURT: Here is -- I think you may -- you know, maybe -- I have got a legal question and you're making a factual argument. Let me give you this as a way of crystalizing it. So Mr. Johnson calls as his first witness at trial Stephensen, let's say. So how much did you sell last year for TruGreen? I sold 280,000 or maybe it is less, you know, but it is some amount. And then he says, okay, judge, that is our damage figure 280,000. We want restitution. Is he legally entitled to take Stephensen's sales or maybe you would have to make it profits, let's say the profit margin on that is whatever so say it is 50,000 in profits. Is he entitled to get that legally back to Scotts as a restitution for competing when he shouldn't have.

MR. GIBB: I think the court has answered that in its prior order very expressly no. And the reason for that is that the court said that the defendants have offered as an undisputed fact, and TruGreen has not contested it, that various factors would have to be taken into account in developing such a calculation and then it lists, on Page 39 and 40 of the order, factors A through I which would also necessarily have to be taken into count when calculating that revenue. And it is also -- this is all tied together

because it is also the very reason that Mitch Smith cannot say the very same thing that Mr. Elggren attempts to say. And that is, I had revenues in 2005. I set a budget in 2006. And now it didn't get met. And so therefore any loss that I get from that is attributable to them, and any gain that they realize is my restitution. No. The court knows and has previously ruled, correctly we believe, that the appropriate measure of damage must consider these other factors. And the plaintiffs were under an obligation at summary judgment to go ahead and rebut those contentions as contained in the report of Mr. Rasmussen. They failed to do so. And the court found they were deemed admitted and they are now the record on summary judgment before the court.

So with respect to that issue, even if you start with the restitutionary basis, and you have to consider these other additional factors. And we did that, even though we weren't obligated to do so on summary judgment, Mr. Rasmussen went through, and I'll just cite the court quickly.

THE COURT: I mean I'm still -- let me just bring you back because this is where I'm getting hung up here. I thought I was ruling on sort of a lost profit damage calculation expert saying, you know, these folks were competing and it hurt these folks by X amount and I'm saying wait a minute, to do that you have got to take into account

all these other factors:

MR. GIBB: I agree.

THE COURT: But if they said okay, we're going to simplify it much more. You made a dollar, you made 280,000 in sales, we should get that as restitution. I mean where is -- does the law allow you to do that?

MR. GIBB: No.

THE COURT: So help me understand.

MR. GIBB: No, because there has to be a causation basis for that. The court, as it properly found in its prior opinion, stated that you have to go through and show how it is attributable to each of the individual defendants. And you have to go through and --

THE COURT: See that is the answer they say okay Stephensen he is the defendant here, 280,000 in sales, we want his sales, they should have been ours, we want them. We want them for us.

MR. GIBB: Um, no. Legally they have to show why they are entitled to that from a causation standpoint and they have to be able to do that with the facts in the case. Mr. Rasmussen has testified at Paragraph 73 of his report regarding the causation elements that would need to be considered when looking at that measure, and he is also analyzed at Paragraph 160 through 191 of his report what is wrong with Mr. Elggren's methodology with respect to that

issue. Mr. Elggren assumed what the defendants are asking you to do and that is namely that there was a restitution basis. The only thing they have to prove is this amount that Scotts made. And the court properly found that the true measure of damage in this case is lost profits because you do have to make appropriate reductions. And then when calculating lost profits, that you have to calculate these other factors. And my other point to you is, even if you were to take a restitution basis and say it is that flat amount, you are still going to have to reduce it by the factors that Mr. Rasmussen considered and then ultimately explained it in his expert -- expert report.

Now Mr. Olson is going to talk a little bit more about that and I can visit the other parts that I was going to talk about were and I can just briefly give you an outline of where I was going. First of all, Mr. Mantz's memo is a March 16th memo. So it takes into account from January to March 16th of 2006. Mr. Rasmussen's report is for the entire year from October, in fact before that, from October of 2005, to be safe, through December of 2006. So to the extent that the court is looking at data, it should look at Mr. Rasmussen's report with respect to that.

Um, with respect to --

THE COURT: Can we go back to the restitution. I'm still hung up on this. And maybe it is because my

background, as you all know, is probably more on the criminal side of things.

So in a criminal case, if a bank robber goes in and takes $10,000 from a bank and, you know, he is convicted, you know, give the $10,000 back.

MR. GIBB: Right.

THE COURT: So when I hear Mr. Johnson and Mr. Ingram say okay, restitution, we had a guy working for us, Stephensen, let's say, and he was making sales for us. Now he is making sales over there and we want restitution. I am thinking, okay, whatever he sold over there, they're saying just give it back to us and they have got the numbers to show what that is. Is there something legally wrong or chronologically wrong with that?

MR. GIBB: Yes. Restitution puts the party back in the position it was prior to the damage being incurred. And so in order to do that, you have to not only factor what was gained over here, but what it cost to do that. And then you also have to show that that was causally linked to their damage. Because the gain of one party does not necessarily mean that this -- that is this other party's damage. And therefore you have to show connections for each of the defendants as to why this amount of increase is their damage. And there are a number of factors that Mr. Rasmussen goes through, there is branding, there is --

there is number of employees. There is a number of other factors that he has talked about in his report regarding what needs to be considered. Relative experience of the employees. Whether or not their job duties were similar at TruGreen and at Scotts. Whether or not they were in the same geographic area and other things like that.

All of those factors need to be considered when fashioning a restitution based remedy. Now, they would like you to say that we have expert testimony from Mr. Elggren. That Mr. Elggren has said based upon the Scotts franchise agreement, there is a dollar for dollar correlation between goodwill being purchased in a re-purchase by Scotts of a franchise under its franchise agreement, and that means that that equals goodwill that we have lost. No. They have to show that relationship causally, with all of the evidence that is currently before the court on the summary judgment record, they have failed to rebut it in the summary judgment record, and it is now undisputed for that reason.

THE COURT: See you keep moving into the facts and I'm still thinking law here. I'm still thinking that I heard from the plaintiffs in their briefs that it is an unresolved question of Utah law as to whether you can just, you know, award restitution on a competitor, move it over from --

MR. GIBB: Let me let Mr. Olson address that.

THE COURT: I appreciate -- your advocacy is always

very good but maybe I'm --

MR. GIBB: If you have questions about the reconsideration or --

THE COURT: I'm not trying to -- that is to say I'm not -- I appreciated the arguments of Ms. Waite-Grover, but I'm still not convinced that on that particular piece I still think I made the right decision on getting Elggren out of here. But maybe you want to take a run at this, Mr. Olson.

MR. OLSON: I'll take my best shot. I think I understand your question. I've tried to follow where you're going with this and I think Mark is right. I would like to focus -- he got into the facts. I would like to focus a little bit more on the law.

First, we have -- we have addressed the proper measure of damages ad nauseam in our briefs. Our summary judgment opposition went on for several pages, it was Page 40 to 51 of our summary judgment opposition where we addressed the measure of damages. What is interesting about TruGreen's recent briefing, particularly the reply brief, is that no Utah or Idaho cases are cited with respect to restitution allegedly being a proper measure of damages.

Utah courts and Idaho courts have already spoken on this. They have already stated that restitution is not the proper measure of damages both for the contract breaches

that we're dealing with, and for the tortious interference claims that have been raised. And you know Mr. Gibb mentioned that restitution is putting the party back in a position that it was in had the breach not occurred. And that is reflected in the Polyglycol case which was a restitution case in Utah that is cited in TruGreen's reply brief. I don't have the -- it is actually Page 6 of the reply brief. They cite the Polyglycol case which says that an action for restitution is appropriate when claiming recision as an alternative to an action for damages. The problem with that is this is a damages case, not a recision case. There has been no attempt to rescind any of the contracts they are instead claiming damages. The Dunn case, I think, resolves some of the concerns that the court mentioned. And I didn't print an extra copy. Frankly I didn't expect to get too heavily into restitution today.

THE COURT: See the thing that -- what has been crystallized in my mind is I have been trying to avoid, I guess, doing the hard work of figuring out what the law is on damages, thinking oh, we'll do that when we get to jury instructions and so forth. But I think the oral argument at least to me has crystallized that I have got to get firmly in mind what the measure of damages is before I can rule on whether one side or the other has enough evidence on that. And it seems to me to be pretty clear that if the measure

were dollars you all were earning, could be handed over to them and they have got evidence of that and I shouldn't grant summary judgment. But if the measure is more figure out exactly how much, you know, you were disadvantaged by all of this, then you're on a stronger footing for summary judgment argument along the lines of my tentative order.

MR. OLSON: I understand. And I have plenty of other things I could talk about, but let's focus on this.

THE COURT: This is the one that is troubling me the most right now.

MR. OLSON: The Dunn case was kind of an interesting case. It is an Idaho Court of Appeals case and it dealt with a breach of a covenant not to compete that was ancillary to a sale of the business.

And Mr. Johnson referenced it today and said that the Dunn case adopted some sort of restitutionary measure. I'm not aware that you'll find the word restitution any where in the case and, in fact, it says just the opposite. It says that lost profits is the measure of damages.

THE COURT: Is Dunn your best case?

MR. OLSON: Is Dunn our best case?

THE COURT: Yeah.

MR. OLSON: Um, as to the measure of damage?

THE COURT: Yes.

MR. OLSON: For breach of a covenant not to compete, I think it probably is our best case.

THE COURT: Let me -- I'm thinking, we have been going for a while. I think it makes sense to give my court reporter a break. To take 15 minutes. I'll take a look at Dunn. I should ask Mr. Johnson and Mr. Ingram what is your best case on this that you would like me to take a look at?

MR. OLSON: Could I just say pages 61 to 62.

THE COURT: Okay.

MR. OLSON: Where it talks about lost profits being the measure and where the plaintiff's lost profits claim was rejected because he didn't focus on his own losses but focused on the defendants gains.

THE COURT: And for your side, was there a case I should be looking at?

MR. JOHNSON: Probably in our summary judgment motion, the National Merchandising case. I don't know if I have -- if we have the citation, Your Honor.

THE COURT: What is the cite on that case?

MS. WAITE-GROVER: 348 Northeast 2d 771. That is a Massachusetts case.

THE COURT: All right. Why don't we take about a 15 minute break. I know we've been going on for a while here, but this is an important juncture in the case and is that convenient?

MR. OLSON: Yes, Your Honor.

MR. JOHNSON: Yes, it is.

MR. OLSON: If I could just add, Dunn is our best case on lost profits for breach of contract in Idaho. It is the Robbins case that we have cited that in assessing actual damages for breach of a non-compete in Utah. It is the Robbins case. The tortious interference cases that we have cited, they are all cited in those pages of our brief and they include, let's see, here it is, in Utah the Sampson case which recognizes the restatement of tort section 774(a). And in Idaho, the Barlow case which adopts that same restatement provision. Both of those cases say that the loss of benefits under the contract or consequential damages caused by the interference is the measure. And those are the cases, Judge.

THE COURT: They have given my a couple more cases. Do you want to give me a couple more?

MR. JOHNSON: I think the careful reading of the Storage Tech, Your Honor, notwithstanding the treatment of the expert in that case is eerily similar to the treatment of the expert in this case. I think it does support the restitutionary measure and I think, Heather, do you have the cite?

MS. WAITE-GROVER: I'll give you a third citation. It is the restatement second of tort section 774(a)

particularly Comment C where it talks about actual losses being difficult in certain contract cases.

THE COURT: Restatement -- I'm sorry, 774.

MS. WAITE-GROVER: A.

THE COURT: A as in apple?

MS. WAITE-GROVER: Correct.

THE COURT: Is there a comment in particular?

MS. WAITE-GROVER: Comment C.

THE COURT: Why don't we -- if it is convenient for you all, I know we have a lot of lawyers here and everything, but could you come back at 12:30? Is that --

MR. JOHNSON: Sure.

MR. OLSON: That is fine.

MR. INGRAM: With respect to this, this has been briefed pretty heavily. If you go back to summary judgment, all these cases are in there including one factor which I think is important, which is the reason why restitution becomes important is when you have all these competing interests and not simply just customer A and customer B which is a big factor in lost profits but extraordinary training.

THE COURT: I think I let the lawyers down here because when I was doing my first summary judgment ruling, I said okay, let's just park damages over here and let's focus on liability. And then having done that, now I got some

more briefing on causality but I didn't go back to read the cases in the briefs as thoroughly as I should have. So in 20 minutes I'll try to rectify that error just a little bit and see you all shortly.

MR. GIBB: Thank you, Your Honor.

MR. JOHNSON: Thank you.

(Recess.)

THE COURT: All right. I have had a chance to review some of the cases and I apologize to everyone for keeping everyone through lunch here. I also apologize because I think I have created some difficulty here in an effort to mentally compartmentalize when we would address some issues and when we wouldn't and I kept thinking that this is a jury instruction issue so I can deal with that in a week or two but I clearly should have been focusing on it more. And I have tried to focus on it during the break.

As I sit here right now, this is what I am thinking. The issue is whether there is some measure of restitutionary damages that is gained to the defendant that can now be handed over to the plaintiff. And then we're in Idaho and Utah so the question boils down does Idaho recognize that and does Utah recognizes that. My current thought is Idaho does not recognize such a theory based on the Dunn case in which there is a sentence that says the measure of damages is not the amount of profits made by the defendant, rather

it is the amount of profit lost to the plaintiff because of the breach. I suppose you could try to distinguish that or something but that seems to me to be a pretty good indication of the Idaho courts would not recognize the theory.

Utah law, however, seems to me to be an open question. Sampson talks about the fact, as Mr. Ingram was pointing out, that once the act of damages has been established, you can go with the lesser proof on the amount of damages over nonetheless you have to have reasonable assumptions or projections. And it is still very difficult for me to see how the plaintiff is going to do that. But the plaintiffs have said way wait a minute, the way we're going to do it is the way they do it out in Massachusetts in these cases like National Merchandising Corporation versus Layden. There they don't even mess around at least with the plaintiffs election they don't have to mess around with showing that there has been a loss to the plaintiff. You can simply show gain to the defendant and that is enough to move -- to move forward.

So the way I see things, the question boils down to whether the Utah Supreme Court would follow the lead of the Supreme Judicial Court of Massachusetts in cases like National Merchandising Corporation in recognizing that theory. And as I read through the cases, I don't see

anything that really gives me much of a feeling for what the Utah courts would do with this. I don't see -- I see the recision case that is Polyglycol being a recision case which I think is distinguishable. Robbins versus Finlay and the liquidated damages case that doesn't seem to me to speak to that. And Sampson, while talking about loss to the plaintiff, doesn't seem to foreclose this other theory. If it were to up me, if I were the one that got to write the law, I would say the Massachusetts court has it right. That restitution ought to be a reasonable measure of damages. But this isn't a question for me to decide. It is a question of what Utah law would be and what the Utah courts would recognize. If I were to rule this second, my thought is that I would certify to the Utah Supreme Court the question of whether it would follow the lead of the Massachusetts Supreme Court on this theory. I wonder if that looks like a cop out because it will slow the case down for a while.

But the problem is if I move forward now, I have got to make a prediction one way or another. If I grant summary judgment for the defense on the theory that the Utah Supreme Court would not recognize the theory, then plaintiff goes up I guess to the Tenth Circuit and the Tenth Circuit would probably say I think the same thing I'm thinking. We don't know what Utah law is. We have to ask the Utah Supreme

Court.

On the other hand, if I rule against the defense and rule in favor of the plaintiff and say I'm going to go with the theory that the Utah courts would follow the Massachusetts case, then we have a whole trial and all of the money attendant to that on a flimsy legal foundation.

So that is what I did in the last 20 minutes. I think Mr. Olson is up to bat and that is where I'm sitting right now. I'm glad to hear from either you or Mr. Gibb about where we are going.

MR. OLSON: I'll start.

THE COURT: All right.

MR. OLSON: Okay. I want to stick to these issues and then perhaps I'll just quickly respond to some of the other issues that we wanted to talk about. I'll try to breeze through those. Okay. First, I do want to make clear that we have got both contract claims and tortious interference claims.

THE COURT: Okay.

MR. OLSON: And even within a contract realm we have multiple different claims that have been raised. Some of which have already been discarded, some of which are still in play.

THE COURT: And I'm painting with a broad bush here but I'm thinking the legal issues are similar regardless of

which of the contract claims we're under and I haven't really conceptualized whether it is different on a contract claim or a tort claim. But I'm assuming similar issues would arise on both. The Massachusetts case is a tort case, I would take it, and there is still -- there are still -- are there still Utah tort claims alive at this point?

MR. OLSON: Yes.

THE COURT: So the Utah --

MR. OLSON: The Utah tortious interference claims are still alive and I think those can be disposed of for the same reasons as the Idaho cases in light of the restatement of torts. I guess what I would like to do is maybe separate out the different contract claims and separate out from those contract claims the tort claims. Because I do think different legal principles will apply. And in the event the court is going to go ahead and make some certification, certainly we don't think that would be necessary and I will explain why, but it should be narrowly limited to what is left, I guess. It can't be decided based on the law that we have.

First as to -- let me just start with the tortious interference claims. And pointing specifically to Sampson V Richins, which is the Utah Supreme Court case, excuse me, Utah Court of Appeals, not Supreme Court, 770 P2d 998, it addresses on Page 1006 and 1007 the restatement second of

torts. Now the reference that was made by Ms. Waite-Grover is to comment of that restatement that says that damages are difficult to prove. We understand that damages are difficult to prove. They still need to be proven with some degree of reasonable certainty. And it is the restatement section itself that dictates what that measure is and it says, in this case, that it recognizes the restatement provision that says damages are limited to the pecuniary loss of the benefits of the contract or the prospective relation or consequential losses for which the interference is a legal cause.

And then the court goes on to say, referring to judge Croft, the trial judge, "thus, Judge Croft's findings must identify actual pecuniary losses suffered by Richtron, the plaintiff, as a result of Sampson's conduct." Okay. So tortious interference in Utah requires an assessment of the actual losses as a result of, as it says, so, caused by the tortious interference. So we think that is established. Nothing in this case would lead to a conclusion that some sort of restitutionary measure of damages would apply.

THE COURT: I haven't had a chance to work through all of the case law supporting the Massachusetts approach to this, but I'm assuming the Massachusetts approach to this was not crafted in ignorance of the fact that the restatement talks about losses and so forth.

MR. OLSON: Certainly. And courts are entitled to take different sides of issues. But unfortunately, for TruGreen's position, we are stuck with what the Utah Court of Appeals and Supreme Court have said with respect to these issues. And since that statement has been made by the Court of Appeals, we think that the court should follow it.

Again, with respect to the tortious interference claims, and the Barlow case and the other case that we have cited on damages brief, or excuse me, in our summary judgment opposition in Idaho it also recognized this restatement provision which again focuses on the pecuniary loss of the benefits of the contract. The benefits of the contract aren't some one else's gains. They're the plaintiff's losses. And it is that simple with respect to tortious interference.

Going to the contract issues, Your Honor, and again as I mentioned, there are several different contract issues. The one specific issue that was raised in Dunn was the covenant not to compete which is one of the four claims that have been raised in this case. As for the covenant not to compete, Your Honor has already noted as in Dunn that it is limited to lost profits. The reason that causation comes into play, with respect to the different damages or excuse me summary judgment going the wrong direction to the different breach of contract claims, again for breach of the

confidentiality provision, the non-solicitation of customers, the non-interference of employees, the reason that causation is so important is because different damages flow from those breaches.

Let's take an example. We have talked about Stephensen. We should probably talk about someone else because the court has already determined that he didn't have a covenant not to compete. So let's pick one of the Idaho guys. Clogston. James Clogston, let's assume, as has happened, that he has gone from TruGreen to Mower Brothers. He gets to Mower Brothers and, you know, our opinion, again, I don't want to delve into facts, but it goes to show how causation is important. Mower Brothers business is centered on heavy advertising. Mr. Clogston was an inquiry salesman meaning that these fliers would go out to people and they would return them or they would call in and say yeah, I want to sign up. And Clogston is the inquiry salesman sitting in the office, calls them back and makes the sale. Okay? What TruGreen has to show is that it would have obtained those sales had Clogston not breached his covenant not to compete. And what that has to take into account is, for example, is as mentioned in Mr. Rasmussen's affidavit and as the court recognized in its summary judgment order, that the court would need to take into account would TruGreen have obtained that sale? What kind of advertising does TruGreen do? Does

it do a sufficient level of advertising that it would have obtained that customer? And so on with the other causation factors. Those have to be taken into account before the court can say that that particular sale to a particular customer by James Clogston would have been obtained by TruGreen if not breached. And that is the analysis that Mr. Elggren failed to do and it is this precise same analysis that TruGreen's lay witnesses cannot replicate. Mr. Elggren has not attempted to do it even though Mr. Rasmussen, as illustrated by his expert report, laid out the framework for being able to do it, that it can be done. They just haven't done it. This isn't an issue of damages being difficult to compute. It is an issue of damages not having been computed and the proper assessment not having been done.

So I would like to submit, I suppose, the issues relating to the measure of damages with that unless the court has any other questions relating to the cases or any of those issues.

THE COURT: So I mean you -- if we're in Massachusetts, you would lose. Is that a premise we both --

MR. OLSON: As to tortious interference?

THE COURT: As to tortious interference.

MR. OLSON: Perhaps. Perhaps as to tortious interference. But that is a completely different issue.

And again, tortious interference they have to show that the actual interference with a contract resulted in this damage. In Massachusetts perhaps it is a little bit different. But here, you have to show that that tortious interference caused you an item of damage which has not been shown. And again procedurally we're here on summary judgment. It was their burden to come forward with some evidence showing such a loss on summary judgment. And what Your Honor has heard today, as has been stated in TruGreen's latest briefing, is not what damages have been shown, it is what damages we hope or we think we might be able to show, our witnesses may have the wherewithal to show. And it is a little too late for that. We have to have something now and it has to have been presented already.

Um, there hasn't been any alternative damages theory that TruGreen has come up with. The restitution theory that we have been dealing with today is the same one that Mr. Elggren attempted. We have not seen any evidence that would permit any lay witness to be able to replicate it. Um, one issue I would like to point out so that the record is clear, is that TruGreen's own -- TruGreen has made some statements in its briefs just recently, now that it is starting to actually try to focus on its own losses, TruGreen has made a statement in its reply brief, this is on -- on Page 14 and Page 15 of its damages reply brief, that

TruGreen has suffered certain lost sales or lost revenues from 2005 to 2006. But I would like to point out, and it has been mentioned today, is that there is no evidence in the summary judgment record, that TruGreen lost sales and lost customers from 2005 to 2006. In fact, TruGreen's own evidence suggests the opposite.

Mr. Omas, O-M-A-S, however you say his name, he stated in his deposition, this is one of TruGreen's own witnesses, that TruGreen had more customers at its Boise office in 2006 than it had in 2005. This is his testimony on Page 55 and 56 of his deposition. So the evidence shows that if anything, TruGreen gained customers from 2005 to 2006.

Briefly, with respect to Exhibit 93, and I won't waste a lot of time on that, Mr. Johnson did indicate that their evidence of a causal connection between breaches and losses is Exhibit 93. We have moved to strike it. The reason being is number one it has never been offered on summary judgment, it has never been authenticated. It was prepared by someone else. It was never submitted in an affidavit in this case and the court shouldn't consider it.

THE COURT: Is there -- I didn't see in your pleadings a Daubert type challenge or Kumho Tire type challenge and frankly it occurs to me that that is the more central problem with that document rather than, you know, some question, some technical question of foundation or

authentication or something like that.

MR. OLSON: Well, I think that is true. They would need an expert to be able to come in and tie together the allegations of that document. Whatever they are, we're not certain what it alleges. But it -- it purports to be a comparison between TruGreen employees and our employees, or former TruGreen employees. An expert would need to come in and lay some foundation for it and show how that creates some sort of causation of damages.

THE COURT: I didn't see that in your pleadings yet and I'm wondering whether that -- does that come up in a couple of weeks at the final pretrial, something by way of a motion in limine?

MR. OLSON: Well --

THE COURT: The way I see that document is, you know, from your perspective, and obviously the plaintiff has a different perspective, and some sales person says by golly look at all the people that left. I bet we would have made $2.7 million more if they were here and writes that down. The -- and the sales person is just speculating, let's assume. We wouldn't admit Plaintiff's Exhibit Number 93 with that number written down because it would be simply speculation.

Now, if a qualified expert said by golly having considered all of the relevant factors, I think it is 2.7

million and writes that down, then we would be in a different situation. So the real question is whether the person writing down the numbers had a sufficient evidentiary or sufficient expertise to reach that conclusion. That seems to me to be the issue presented there.

MR. OLSON: I understand. The 702 challenge to that really goes through the motion to exclude Mitch Smith as an expert. To the extent Mitch Smith is being used to bring in that document, certainly he is not qualified to opine as to how that creates some sort of damages theory. There has been no damages theory that has been presented to us or damages calculation in initial disclosures or on summary judgment that relates to that document. It is a document that has been thrown in in the last minute. And the best we can say in looking at it, not knowing which expert is going to be attached to that document that is going to use it, is simply that it has never been authenticated. We don't even know what it is or what it is purported to show. So I hope that explains why we haven't made that sort of challenge. Certainly if they come forward with a new expert, we will make that challenge. It just hasn't been identified yet.

THE COURT: Okay.

MR. OLSON: One issue, Your Honor, that hasn't been addressed at all today, is the new Utah employees. And I don't know if you want any argument today --

THE COURT: Attorney's fees.

MR. OLSON: -- with respect to attorney's fees. We fully briefed that.

THE COURT: Right. My theory was to park that issue down the road frankly because --

MR. OLSON: Happy to park it. That is fine.

THE COURT: The reason was I'm still, hope springs eternal, hoping for some sort of a resolution of the matter without the court's intervention. And it seemed to me leaving that out there for a while might be desirable.

MR. OLSON: I understand. We're happy to do that. Just finally, and just 20 more seconds, ultimately where we're left with in this case is nominal damages. The statement that has been made, I think Mr. Ingram mentioned, that we can figure it out somehow, relating to the amount of damages. I think Mr. Johnson conceded we don't know what the amount of damages is. It is difficult. It is imprecise. It is tough to put a finger on. The result in those cases, and those situations, is an award of nominal damages. And that is what the court stated in the Turtle Management case where the court said, quote, if the amount of damages has not been proven, end quote, nominal damages is the measure.

So at best, they're entitled to nominal damages in a case like this where it is not a matter of damages being

difficult to prove, it is a matter of not having any witness who can come forward and testify to some specific amount of damages that was caused by any specific breach of contract or tortious action.

THE COURT: Let's go back to what the state of the law is on the restitutionary theory of damage. Your break down is helpful. We need to think about torts and we need to thing about breaches of contract. The Massachusetts case is a tort case and I guess Sampson is a tort case, is that --

MR. OLSON: I'm sorry, which one is a tort case?

THE COURT: Their case, their best case is a Massachusetts tort case. And then you come back with Sampson which is a -- is that a -- that is a tort case, right?

MR. OLSON: Right. And the other two Idaho tort cases that recognize that same restatement provision which are the Barlow case and the Safeco case which all recognize lost profits. Particularly the Nora v Safeco Insurance case which recognizes lost profits is the measure, Barlow recognizes the restatement. Those are both tortious interference cases in Idaho.

THE COURT: This Massachusetts case is a 1976 case and it collects a bunch of law review articles talking about what seems to be the hot new theory, you know, lost profit, you know, restitution. I'm wondering whether this is

something that was all in vogue 30 years ago, but, you know, the law professors didn't carry the day in the intervening three decades or something. Do you have any --

MR. OLSON: I can only guess. I haven't read the law review articles in any detail, but I do know that the tortious interference cases that we have cited all happened after the Massachusetts case. So, you know, the fact that there is one Massachusetts case that goes that way, I would say, is not sufficient for the court to go that direction particularly the Utah Idaho cases that we have. So I think if there is going to be any certification, it certainly wouldn't relate to tortious interference which has been established already.

THE COURT: I haven't had a chance to review all of the defendants cases and my instinct is, and I'm sure they'll let me know if I'm wrong, the cases they have got on restitutionary damages are tort cases because there, and that is maybe when I was talking to Mr. Gibb, I'm thinking kind of criminal. And tort law, of course, is separate from criminal law but it does bear some relationship. And the theory being just as the bank robber has to give his money back, there is an argument, as articulated by the Massachusetts court, that a tort feasor ought to give his money back. And that is -- maybe that is the analogy. The analogy would not work very well in a contract situation

because I mean there we're just protecting economic expectations and so forth.

MR. OLSON: Right. But I understand the similarity there. Unfortunately, it has just not been -- well, I shouldn't say unfortunately. Fortunately --

THE COURT: Fortunately for you.

MR. OLSON: That is right. It is -- that has been rejected by Utah and Idaho. And then going to the --

THE COURT: All right.

MR. OLSON: Going to the contract cases then, if you want a break down of those, we did need to look at what is left.

THE COURT: No. I think based on our discussion now, it doesn't sound like the analogy is going to work in contract cases at all so we don't need to get there.

MR. OLSON: Okay. Great, thank you.

MR. GIBB: Your Honor, just one thing that I would point out. Under traditional court tort analysis, you have a duty, a breach, you have causation and then you have damages. And so the measure of damages is determined after you show that there was damages that were proximately caused as a result of that breach. Causation still occurs whether it is a tort or a contract because in a contract case you have got a breach that then proximately causes damages. So in both of those contexts, causation is a critical analysis

to make in both sets of circumstances. And if the court finds that there indeed has been no evidence of causation presented on summary judgment, the court can show or can state, as a matter of law, that the claims should be dismissed as to both types of claims no matter what the -- under either of those traditional analysis.

THE COURT: The problem I'm having is I think Mr. Johnson, aided by Mr. Ingram and Ms. Waite-Grover, make a pretty persuasive case that hey the jury could find, based on all of the evidence we have got, that there was at least we suffered some damages. Where they're having more difficulty is all right is that one dollar or is it 2.7 million dollars.

MR. GIBB: Exactly.

THE COURT: When we get there, what the Massachusetts court says that I found persuasive on quick read is we don't want to create a world where tort feasors can say well, um, I'll make a ton of money if I do this, and I'll bet they're not going to be, you know, my gain will exceed their loss so I'm going to go ahead and commit the tort. It will be some kind of efficient tort and --

MR. GIBB: I guess I would suggest the situation here is a little different in the -- from the perspective that we have now had full summary judgment relief on the issue of whether or not there is evidence of causation or not. The

evidence that they presented on summary judgment as they argued it in their memorandum was that Mr. Elggren was their causation evidence with respect to that. And they have now had to switch because Mr. Elggren was -- was excluded from trial, but they argued in their summary judgment memorandum, I believe it was in their reply memorandum, that you can infer that from his report. With the report excluded, they are now faced with the full analysis from Mr. Rasmussen that is unrebutted that goes through all of those causation factors and finds that there is no causation that has been demonstrated in this case.

THE COURT: Well, I mean I have to say I do think we have switched course a little bit because Ms. Waite-Grover's position today was well he just assumed causation that is why you let him in. And I do think that a couple of weeks ago it was more along the lines you're describing. It may be I misunderstand the --

MR. GIBB: I believe in the deposition testimony he -- the quote from Mr. Elggren is I said I did not address causation and that is in his deposition at 201 and 202. It is not that he assumed it, it is that he never even addressed it.

THE COURT: Okay. All right. I think I understand your position.

MR. GIBB: Thank you, Your Honor.

THE COURT: Thank you, Mr. Gibb.

MR. INGRAM: Your Honor, first of all, there is a concern between distinguishing between the torts and the breach of contract. I think the case that is especially illustrated why both the tort and the contract are intertwined is the Storage Tech case which is not a 30 year old case, it is from 2005. There at issue you have tortious interference and breaches of non-compete covenants and employee non-compete covenants. And there is a direct citation to the restatement 774(a) which is the same restatement relied upon in both Utah and Idaho and determining the proper measure of damages from the tort. If you read the Storage Tech case.

THE COURT: Tell you what, give me just a minute here and have me focus in on the language. I have got it right here in front of me. This is the Eighth Circuit predicting what Minnesota would do. And they predicted that Minnesota would allow a restitutionary remedy in a case in which the interference alleged was inducing employee's breach of non-competition and non-disclosure covenant. And that is the restitutionary remedy of the type we have been talking about.

MR. INGRAM: And the reason why they're intertwined, if you read that case carefully, one of the big things at issue was non-disclosure of confidential information. And

that, that in and of itself, takes you to the next step as well. Why is restitution not a proper measure of damage of breach of contract case? Well, in an ordinary contract you don't have all of these legitimate business interests that we have been talking about. This is not an ordinary contract. These are special contracts. That is why we have been arguing at length over whether or not there is a legitimate protectable interest in there. And in the cases in both Utah and Idaho where they're -- not Utah but just Idaho and some other cases we have been talking about lost profits with those contracts, the only legitimate interest at issue in those cases is really addressing was the solicitation of customers. What you have is an easy recognition of customer A to customer B. And what they're not addressing are these other legitimate interests like non-compete or, excuse me, the non-confidential information, extraordinary training. Those types of cases, based upon the Storage Tech case, actually lend themselves to restitutionary measure of damages. Why? Because in those cases you can't simply say it -- you can't simply point to a loss to TruGreen because of the breach of its -- the loss of its confidential information and loss of competitive advantage. What you have instead is again this jump of a learning curve. It is not so much that TruGreen is so down, although they are down, it is that the defendants have been

able to overnight make this jump based upon this training, this confidential information. That is why restitutionary measure of damages is appropriate to again put the defendant -- put them in the place where we were before the breach which is the competitive advantage that TruGreen had that they had earned through years and years of investing these guys, spending money and knowing the Utah market.

THE COURT: I agree with that. If I were king for a day, I would say restitutionary damages ought to be the law. But, of course, I am not king, I'm interpreting what Utah and Idaho courts would do. And so why don't you tell me what you think.

MR. INGRAM: First of all in Utah you would find nothing on the proper measure of damages in a breach of non-compete covenant. Absolutely nothing. The only thing you will find is injunctive relief.

THE COURT: So should I certify the question in your view or should I just rule in your favor without certifying? You want me to rule now?

MR. INGRAM: I would like you to rule in our favor. Go ahead.

THE COURT: I mean, what -- what would -- is there anything in, I mean, can I just say by golly I read some law review article and it sounds like a nifty theory to me and I'll bet the Utah courts will buy into this nifty theory.

MR. INGRAM: Yeah, we can find a basis for the measure of damages in Utah and tort claim at 774(a). It is the same restatement cited in the Storage Tech case which then takes the added step of applying that to a breach of non-compete covenant where you have all these other interests at issue. Not just some ordinary contract. Jm, couple that with the fact Utah never ruled on what the proper measure is damage breach of non-compete and they never addressed the proper measure of damages in light of all of the legitimate protectable interests like confidential information, like training.

So frankly it is wide open. You have got to look at the case of these other states. Coupled with the fact if you look to Utah law, well, um, if you can show misuse of a trade secret, for example, Utah statute provides, and this is in TruGreen in the TruGreen summary judgment brief, Utah statute provides that the proper measure of damages both pecuniary loss to the plaintiff and the restitutionary measure of damages for the misuse of that trade secret. I think that gets you where I'm going which is in a sense of pointing us in the right direction which is the reason why restitutionary measure of damages is simply because you don't have customer A to customer B problem which naturally lends itself to a natural loss theory like competition, confidential information, misuse of training, misuse of the

investment that TruGreen has made, also lends itself to a more restitutionary measure of damages. If you look at the Dunn case, too, for example, um --

THE COURT: Dunn is squarely against you. It says the measure is not the amount of profits made by the defendants.

MR. INGRAM: That case involves the sale of a business and non-compete covenant is ancillary to that sale. So consequently, you don't have the protectable interests like we're talking about in this case which is the special investment in employees, the confidential information. What you have in the Dunn case and in the case that it cites to, is the purchaser of the business paying a sum of money to buy that goodwill, and that is kind of -- that is where they're going with those. But it is definitely not an employee case where you are talking about training and legitimate, you know, confidential information not types of interests. Um --

THE COURT: So let me just hear you a little more on certification. What is that? I mean I kind of hear you saying it is an open question and we think on the open question we have got the better of the argument. I mean are you opposed to the certification? In favor of it? Ambivalent?

MR. INGRAM: Maybe I'll let Mr. Johnson speak to that.

THE COURT: I'm glad to hear him.

MR. JOHNSON: My thoughts on that are as follows, Your Honor. I do think in Utah, although there is -- it is one way to analyze it is to, I think, defendants sort of boast of that as well, it is silent. I do think that all of the indicators are, given the restatement section 707(4) and the fact that they haven't been presented with that kind of case, that they probably would go that direction. Do I want to spend the court's time and my time on an uncertainty? No. So if I'm not going to get it now, I would rather be certified then try and go through three years and then appeal. Does that make sense to you? Do you follow?

THE COURT: As a practical matter, I know we're talking about -- I have certified I don't do this all the time. I have been on the bench four and a half years now and I have done it twice. And they both have been situations like this where all of a sudden we're close to trial and here is an issue, and you know, I am -- and I'm thinking what it will do is slow the case down for about a year. Obviously they have their processes for briefing and so forth, and we would have an answer in a year. And if they say -- I mean I am still -- if they say that the tort theory restitutionary measure of damages works, then I think you definitely are up and running.

MR. JOHNSON: And I think personally I believe your instincts are correct. And I just assume you say it now.

But if I have a choice between saying it in summary judgment or saying it as a law of the case before we try it or going through the risk of, you know, I guess certification is not the best remedy but it is better than spending an awful lot of money only to find out that somebody second-guessed you. Do you follow me?

THE COURT: Right.

MR. JOHNSON: No one is going to second guess on an issue like this issue of state law in the Utah Supreme Court once it speaks. I do -- I would just say in passing, that I'm not as comfortable with reading the language in Dunn which granted it is sort of like a movie review. You read the movie review, this movie is great, but there is an ellipses after that that says and there was a comma that said not really. Like the Borat movie, I can't remember what the line was he kept saying in Borat, but where he would pause, he never got at it. But that case is limited to a pretty precise set of facts. And Idaho, like Utah, I mean yeah you can read it and maybe that is an indicator of how the Idaho Supreme Court would go given a case where you have the inchoate protectable business interest at play here. But I'm not so sure they would. I think the states that have seen those kind of cases, like the Minnesota case and the Idaho case, I mean the Minnesota case and Massachusetts case, are cases that do go to the

restitutionary remedy. Keeping in mind that boy these are hard to prove. The problem is you -- your instincts tell you has been exacerbated by the defendant not the plaintiff. And am I going to set a policy here and encourage people to commit torts who is the guy in Chicago, the guy that taught torts there, who was always, you know --

THE COURT: Epstein.

MR. JOHNSON: Epstein is the efficient tort feasor theory. I think that is the problem. And I'm not sure the Idaho court case, although the language is pretty broad, given the narrow controversy of that case, ought to be read that broad. So I would like it certified on that issue. And I'm not stipulating that the Idaho court is entirely -- can be read entirely comfortably that way. I think it is a very narrow case.

THE COURT: Occasionally a federal district court will certify some question and then it will get back something from the State Supreme Court saying you idiot, didn't you read --

MR. JOHNSON: Maybe we ought to brief it first then.

THE COURT: Well, I mean I don't know. You can spill a lot of ink, but I'm sitting here looking at the paragraphs and it starts out saying the measure of damage for the breach of an anti-competition clause is the amount that the plaintiff lost by reason of the breach.

MR. JOHNSON: But in that case, again it is ancillary to a sale of business, in that case I believe and I don't have in front of me, that they used as part of that measure the gain to the breaching party in that case.

THE COURT: But that -- they said the gain was that they thought there was some equation between the gain to the defendant --

MR. JOHNSON: And that is because it is one of those very easy to show a lost profit damage. It is a much tighter case than the inchoate business case which I think has arisen here and in Minnesota and Massachusetts.

THE COURT: I don't think I can say a dollar that they gained was a dollar that you lost. I think in this case there was the flavor of that. They may be -- I don't know maybe every dollar they gained was at your expense but maybe not. And that is the problem I am --

MR. JOHNSON: But you would -- I think the court might concede it is not a case where somebody's goodwill has been confiscated, where somebody's competitive advantage has been destroyed. It is simply a commitment that was made in connection with the sale of business. And we have one of these very same cases right now in Idaho, set for hearing on the 26th, and it is ancillary to a sale of business. They are much easier cases.

THE COURT: I see. I mean you were wondering -- you

made a good point earlier this morning when you talked about what kind of a message does this send about the enforceability of these agreements. I did notice one of the Utah cases had a liquidated damages clause and maybe that is another way --

MR. JOHNSON: That could be the solution.

THE COURT: Where you are an employer and TruGreen, Scotts has similar -- maybe that is the way to do these. Although part of the problem there were some obviously some drafting problems by your clients on some of these.

MR. JOHNSON: Although my fingerprints are on many of these difficulties of the case, they're not on the drafting of the clause.

THE COURT: The clause said while employed by, you know, we agree not to compete while we are employed and then they left. I mean that seemed to me to be something. I think we had differences of opinion on how that should have been interpreted, but I think we could both agree that could have been written a lot more straightforwardly so --

MR. JOHNSON: Yes. I agree with that. If Your Honor has no more questions, I will submit it.

THE COURT: Okay.

MR. GIBB: Just two cases I wanted to discuss and then just briefly some traditional damage analysis, Your Honor. In Dunn the court notes that Dunn failed to present evidence

at all showing any loss of business, loss of customers or loss of profit to his own business attributable towards breach. In addition, although Dunn presented some proof of profits, he failed to show any relation between those profits and Dunn's losses.

Now, I'm also interested to hear them argue Storage Tech, because that was very well discussed in the court's prior order. And I know it was some interest as well that that case involved, according to the court's prior opinion, claims of interference with contractual relations, breach of contract, corporate raiding, conversion, misappropriation of trade secrets, and breach of fiduciary duties.

But, in that particular case, the Eighth Circuit found that Storage Tech failed to produce evidence supporting any amount of damages or restitution. The dispute arose because of the hiring of those employees. But the court found that even if it were to adopt either of those, that he should be excluded for the quoted reason which is the first and most apparent problem with Norton's testimony is that he attributed the entire value of the New Speed acquisition to employees and trade secrets wrongfully appropriated from Storage Technology. Even though New Speed had other assets and employees, Norton did not attempt to value the people or the technology supposedly belonging to Storage Tech by any means other than by ascertaining what prices they paid for

New Speed.

I think we are really very close, if not identical, to that certain situation because they had failed to do, on summary judgment, the very things that are discussed in the Storage Tech case. And like the expert there, this expert failed to do so and they are left without evidence at summary judgment to show those very important things.

Now under traditional damage analysis you have two scenarios really, Your Honor. You can try to show it from contract that we got that they did not realize on. In other words, a customer contract that they wouldn't realize on and shown lost profits as a result of that. And then to show causation and all of the other factors that they're required to. They failed to do that here.

With respect to how they have tried to go and do that, like in the Dunn case, they have gone and just simply said profits are ours. But they have shown no correlation between those two. They have shown no causation between those two and they haven't attempted to rebut Mr. Rasmussen's sworn statement which is now before the court.

Moving to certification, we will be happy to have the court certify it if that is what it feels it needs to do. We can assist the court if the court would like with short briefs on what we think the text of the certification order

should be to the Supreme Court. But in any event, in our view, if the court were to certify to the Supreme Court, it should only certify obviously the Utah issues regarding Utah employees and in the remaining claims that remain before the court.

THE COURT: That is right. And it would be limited to a tort, to the tort issue not a --

MR. GIBB: Well --

THE COURT: Or do you see both? I think I would certify whether Utah law recognizes in a tort action a restitutionary measure of damages that is gained to a defendant being handed over to a plaintiff.

MR. GIBB: Well, I guess what I would say is what should be rather than suggest the outcome, the certification question is what is the appropriate measure of damages if in an interference case involving non-competition and other covenants or whatever. Do you see what I'm saying there?

MR. OLSON: Your Honor, if I could just interject, and I'm sorry to tag team with Mr. Gibb, but I think that the issue that appeared to be left after our discussion was not the tort cases, because again it is triggering and conceded that section 774(a) has already been decided in Utah, already been established what the measure of damages is in these tortious interference cases. What the court recognized was that in the Utah breach of contract context,

it was unclear when we have the Robbins case which is this liquidated damages case, how exactly damages would be calculated. That was my impression on what was left.

THE COURT: Maybe I need to be -- Sampson was a tort case, right?

MR. OLSON: That is right.

THE COURT: So it seems to me -- I don't think that plaintiffs have any case law that says you would recognize the restitutionary measure of damages in a contract situation.

MR. OLSON: Well, I agree with that.

THE COURT: Maybe I should ask the plaintiffs that. Do you -- you have got a good Massachusetts case on a tort claim and Storage Tech is a tort, as I understand it.

MS. WAITE-GROVER: We have shown --

MR. GIBB: I think it is both, Your Honor. Storage Tech is.

THE COURT: Storage Tech is both.

MR. GIBB: Yeah. It is a breach of contract case as well.

MS. WAITE-GROVER: Storage Tech essentially involves a case that is very similar to here. There was an employment agreement that had two provisions in it, non-competition and non-disclosure of confidential information. One of the defendants in there was the employee defendant who had

allegedly breached the competition provision and the disclosure provision. The other defendant was the competitor who had hired this employee in violation of the competition agreement and had allegedly used the confidential information of the other party of the plaintiff including the employee.

The analysis that the court made in that case, and the reasoning that it uses, is really critical. It says where the underlying breach would have supported a restitutionary measure of damages, the tortious interference measure of damages will mirror that. And I think that pleads very well into the restatement which Storage Tech did cite. Because the restatement essentially says when you -- when you induce someone to breach a contract, you're going to be liable for the same thing that the person is liable for because of that breach. In the Storage Tech case the court went back and said look an employee in Minnesota who breaches a non-competition agreement and disclosures confidential information, not trade secrets, but just confidential information, could be required to account for its profits. And that word accounting is essentially restitution. You give back what you got, because the profits that you got because you disclosed the information, you competed. And so then the court went on to say, if that employee who breaches that agreement can be required to account for the profits

and the revenues gained from the breach, so too will the competitor who induces the employee's breach of the non-competition and non-disclosure agreement.

What we do know about Utah and Idaho law is both recognized generally speaking restitution with respect to contract damages. You can get an expectancy measure of damages, but in certain circumstances you could get restitution. It is within the jurisprudence of both states, essentially. Second, what we also know about both Utah and Idaho law, is that if you do something akin to non-disclosure of confidential information, which is the misappropriation of the trade secrets, you're not only liable for your actual losses, but under the statute you can be liable for a restitution of the gains that you get because you misappropriated the trade secret. And then third, with respect to the non-interference provisions at issue in this contract --

THE COURT: Before you move on, are all of the -- I thought all of the -- are all of the trade secret claims out at this point now?

MR. JOHNSON: No.

MR. INGRAM: No, Your Honor, they're still at issue. Breach of non-competition, breach of non-disclosure and breach of non-interference covenants, those are all at issue.

THE COURT: Weren't there some -- I'm trying to remember my summary judgment order, weren't there -- there was ex-appropriation of confidential information or something that got tossed out in the earlier order.

MR. INGRAM: The only thing that was tossed out was solicitation of customers. Not -- and I can --

THE COURT: Okay. It is what it is. I'm just trying to get that front-loaded here.

MS. WAITE-GROVER: And then the non-interference provision that still remains at issue in this case is essentially interference with other employees which is interference with employee contracts. And we think that is essentially contractual version of the tortious and interfering. They agreed by contract not to interfere with their fellow TruGreen employees agreement or employment situation and agreement, whereas the Mower Brothers defendants just didn't have that contractually imposed duty but had the legally imposed duty via tort law. At any rate, we think that the reasoning used in Storage Tech, that is that the underlying -- where the underlying breach was to support restitutionary measure of damages justifies restitutionary damages for tortious interference with that same contract is sound and would be recognized in Utah. The restatement mirrors that. It is -- it says you get -- when you tortiously interfere you have to pay up what the person

who breached the contract would have paid. We think that because a non-competition agreement is different than an ordinary contract since it is not a contract for the sale of goods or the sale or the performance and services, that it would justify a restitutionary measure of damages. What a person in an ordinary contract is trying to protect is lost profits. I'm going to pay you $100, give me 100 widgets. I want to get the 100 widgets that are worth something. If I'm going to pay you $100 to paint my fence, you have got to pay my fence or I'm out $100.

What TruGreen and similar employees are trying to protect in their non-competition agreement is not just a loss of profits, although they may realize that that can be an outcome of a breach. But really what they're trying to protect is the goodwill, the competitive fairness, and the unique services of their employees, all of which are abstracting things which we have discussed previously but are difficult to pin down to a monetary value unlike a contract that is simply about 100 widgets or painting a fence.

So for that reason we think that there is good reason, there is good reasoning behind applying that measure of damages for both the breach of the non-competition agreement and the non-disclosure agreement and the non-interference agreement and the tortious interference with those two

provisions.

THE COURT: I mean your closing line there was that there are good reasons for doing all of this. And when I came out here I'm with you on that, I think there are good reasons for doing this. But there is a separate question as to whether Utah law would follow. I mean is there something in the Utah case law that leads you to think that the Utah courts have moved in that direction?

MS. WAITE-GROVER: Um, I know that they'll get injunctive relief for non-competition agreements. I know that they'll give -- they'll acknowledge in certain part based on Robbins versus Finlay liquidated damages in non-competition agreements, and I think that we might need to do additional assessment of when restitution is appropriate in general contracts. But I can speak to the fact that Utah does acknowledge restitution towards general contracts, but I fully concede that they have never addressed the specific issue of whether restitution is the appropriate measure in a non-competition contract. They haven't ruled it out either, but they haven't addressed it.

THE COURT: All right.

MS. WAITE-GROVER: It may be appropriate for certification.

THE COURT: All right. Well here is where we are. It seems to me three things could happen over the next week. I

could rule for the defense and then we're done. And you can check with the Tenth Circuit and see if I made a mistake. I could rule for you, and then we would be moving forward for a trial. Or I could certify this to the Utah Courts for clarification. And you all --

MR. JOHNSON: In the words of Meatloaf, two out of three ain't bad, Your Honor.

THE COURT: And the problem is you all are spending a lot of client money here. This is what I would propose to do. I'm going to work on this today and tomorrow and maybe give you a phone call, both sides, with the same information as to which of those paths I'm heading so you would know by the end of the day tomorrow what the situation is. The problem is if I rule for the plaintiff, then we have got a final pretrial conference and trial and we have got a lot of work that we need to do on this so you need to know that rapidly. One of the other two courses then the trial isn't looming quickly. Does that -- does that make sense as a plan of attack here?

MR. JOHNSON: Yes, Your Honor.

THE COURT: Does that make sense as a plan of attack here?

MR. GIBB: Yes, Your Honor.

THE COURT: All right. So I'll give you a call tomorrow. And I guess if we're done, if it is one of these

options that is going to put the trial off, we don't have to really think through anything. If the option is to rule -- well, I really don't see how I could rule for you.

I think Ms. Waite-Grover is exactly right when she says the Utah law really isn't there. I mean I think I would be walking out on a limb to rule in your favor on that theory. And I'm not sure I would be doing you any favors because you could spend a lot of money. Hang on one second.

All right. Well, I'll let you know tomorrow. But sitting here right now, my thought is that we're not going to have a trial because I'm either going to certify it or rule for the defense. That is sort of the two things that I am thinking about. But why don't I do this. I'll let you know by 5:00 tomorrow what exactly what the situation is so that there won't be any unnecessary expenditure of funds over the next few weeks if we are not going to have a trial.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: All right. Thank you, counsel. I appreciate the arguments of counsel today and I'll try to get you a ruling as quickly as I can tomorrow.

MR. GIBB: Thank you, Your Honor.

MR. OLSON: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon, the hearing concluded at 1:38 p.m.)

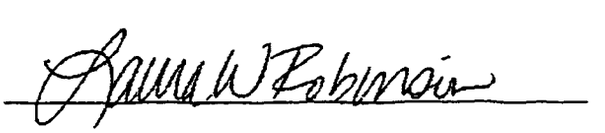
STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

I, Laura W. Robinson, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages, pages 1-101, contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof I have subscribed my name and affixed my seal this 30th day of May, 2007.



Laura W. Robinson, CSR, RPR, CP
and Notary Public

MY COMMISSION EXPIRES:
December 1, 2008